

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

WINTER TERM, 1917.

No. 424.

FIDELITY & COLUMBIA TRUST COMPANY, AS EXECUTOR
AND TRUSTEE OF THE ESTATE OF L. E. EWALD,
PLAINTIFF IN ERROR,

CITY OF LOUISVILLE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

WRIT GRANTED. 1917.

(25,700)

(25,799)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 424

FIDELITY & COLUMBIA TRUST COMPANY, AS EXECUTOR
AND TRUSTEE OF THE ESTATE OF L. P. EWALD, PLAIN-
TIF IN ERROR,

vs.

CITY OF LOUISVILLE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

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FIDELITY & COLUMBIA TRUST CO., EX'R, &C., VS. CITY OF LOUISVILLE. 1

1 COMMONWEALTH OF KENTUCKY:

Court of Appeals.

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 28th day of November, 1916.

FIDELITY & COLUMBIA TRUST COMPANY, as Executor and Trustee of
L. P. Ewald, Deceased, Appellant,

VS.

CITY OF LOUISVILLE, Appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, 2nd Division.

Be it remembered that heretofore, to-wit: on the 24th day of October 1913, and on Aug. 30, 1915, the appellant by its attorneys filed in the office of the Clerk of the Court of Appeals a transcript of the record, which is in words and figures as follows:

2 #61955.

STATE OF KENTUCKY,
County of Jefferson:

Pleas before the Hon. Samuel B. Kirby, Judge of the Jefferson Circuit Court, Chancery Branch, Second Division, at the Court House, in the City of Louisville, County and State aforesaid, and on the dates hereinafter mentioned.

CITY OF LOUISVILLE, Plaintiff,

V.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Partial Transcript of Record.

Be It Remembered, That heretofore to-wit: on the 15th day of September, 1910, came Plaintiff, by counsel, and filed its Petition and 3 Exhibits herein.

Said Petition is in words and figures as follows to-wit:

3 Jefferson Circuit Court, Chancery Branch, -- Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Petition in Equity and 3 Exhibits.

Plaintiff, City of Louisville, says it is and was at the dates hereinafter mentioned a city of the first class, created under and by virtue of the laws of the Commonwealth of Kentucky, and especially an act entitled "An Act for the Government of Cities of the First Class," approved July 1st, 1893; that it has power and authority under and by virtue of said laws to contract and be contracted with, to sue and be sued, and to institute and prosecute this action to recover on the tax bills hereinafter mentioned under and by its corporate name.

Plaintiff says that the defendant, Columbia Trust Company, is a corporation organized and existing under the laws of this State, with power to sue and be sued, contract and be contracted with, and conduct a general trust business, act as executor, administrator of estates, etc.

Plaintiff says that L. P. Ewald was at all the times hereinafter mentioned and up to the 31st day of July, 1909, a citizen and
4 resident of the City of Louisville, and domiciled therein; that said L. P. Ewald died on the 31st day of July, 1909, leaving a last will and testament wherein he constituted and appointed the Columbia Trust Company his executor and thereby authorized said Columbia Trust Company to take possession of, manage and distribute his estate; that said will was duly probated in the Jefferson County Court, being the county of the residence of said L. P. Ewald, and said Columbia Trust Company was permitted to and did qualify as such executor of said estate, gave bond as required by law, and entered upon the discharge of its duty and has ever since been and is now the executor of said estate.

Taxes for 1904.

Plaintiff states that the General Council of the City of Louisville passed an ordinance entitled "An Ordinance providing for the Assessment of property in the city of Louisville for Municipal Taxes for the Fiscal Year ending August 31, 1904", which was approved by the Mayor, and became obligatory August 14, 1903, and was duly published, as provided in said act of July 1, 1893, in the daily Louisville Times and in the daily Louisville Anzeiger, August 18, 1903. By said ordinance the form and manner of taking the lists of taxable property in the City of Louisville by the City Assessor, for the fiscal year ending August 31, 1904, were prescribed; and on the form and in the manner prescribed in said ordinance said Assessor did, be-

5 tween the first day of September and the tenth day of November, 1903, take the lists and assess all the lands, improvements, personalty, franchises, and investments required by law to be assessed by him, in the City of Louisville, subject to municipal taxation.

That before the tenth day of November, 1903, or as soon thereafter as practicable the Assessor aforesaid made out and returned not less than five assessment books, and caused to be entered therein, as near as might be in alphabetical order, the names of all persons who were the owners or holders of lands, improvements, or personalty liable to be assessed, and opposite the name of each person, owner, or holder, the number and block of each of the lots assessed, according to the maps in said Assessor's office, and mentioned in said act of July 1, 1893 (also designated by serial numbers in accordance with said maps, the lots not so designated at the time of the passage of said act or thereafter subdivided), the aggregate value of each parcel of land; the value thereof per front foot, when such parcel fronted on a public way; the value of the improvements; and the assessed value of the personal property.

The plaintiff states that on the 8th day of September, 1903, the Board of Alderman of the General Council of the City of Louisville elected three citizens of the city of Louisville, viz: John
6 McAtter, Louis E. Stein, and H. B. Bernard, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1903, and ending August 3, 1904; that these three citizens thus elected took the oath of office and qualified on November 14, 1903, as members of said Board of Equalization; and said Board of Equalization heard, investigated, and determined all complain-s filed with said Assessor by persons thinking their lands, improvements, or personal property assessed beyond their or its value, and specifying the parcel and alleged excess.

That the assessment books containing the assessments made as of September 1, 1903, remained open in said Assessor's office from the 15th to the 30th day of November, 1903, and the Board of Equalization aforesaid held its sittings and performed the above-mentioned work at said Assessor's office during that time, and until December 31, 1903.

And in pursuance of law, the General Council of the City of Louisville enacted "An Ordinance concerning Taxes for the Fiscal Year ending August 31, 1904", which was approved by the Mayor and became obligatory December 24, 1903, and was duly published, as provided in said act of July 1, 1893, in the daily Louisville Times and the daily Louisville Anzeiger, December 26, 1903, imposing upon all lands, improvements, personalty, and franchises subject to taxation in the City of Louisville, ad valorem taxes aggregating
7 one and 86-100 dollars on each one hundred dollars of assessed value, namely: For schools, thirty-three and one-fourth cents; for police purposes, twenty-two and one-half cents; for fire department, twenty-five cents; for street and sewer cleaning, eleven and one-fourth cents; for reconstruction of streets, ten cents; for street repairs, five cents; for construction and repair of sewers, one-

half cent; for House of Refuge (Industrial School of Reform), four and one-half cents; for charitable institutions, nine cents; for parks, six cents; for general purposes, thirty-six and one-fourth cents; for Sinking Fund purposes, eighteen cents; for Library purposes, four cents; for Firemen's Pension Fund, one-half cent; for Board of Children's Guardians, one-fourth cent; aggregating one dollar and eighty-six cents on each one hundred dollars' worth of property.

Plaintiff says that on the first day of September, 1903, the City Assessor of the City of Louisville failed and omitted to assess certain personal property belonging on said date to the said L. P. Ewald, and which was assessable at the time by the City of Louisville and subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1904.

Plaintiff says that on the 27th day of August, 1909, said City Assessor retrospectively assessed said personal property which
8 had belonged to said defendant, L. P. Ewald, as of the first day of September, 1903, at its fair cash value estimated at the price it would bring at a voluntary sale as of the first day of September of said year.

Plaintiff says that on the second day of September, 1909, the Board of Aldermen of the General Council of the City of Louisville as required by law elected three citizens of the City of Louisville, namely: H. B. Bernard, George W. Hinesley and George E. Spurrier, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1909, and ending August 31, 1910; that these three citizens thus elected took the oath of office and qualified as members of said Board of Equalization and thereafter the said Board of Equalization heard, investigated and determined all complaints filed with said Assessor by persons thinking their lands, improvements and personal property erroneously assessed, or assessed beyond their or its value.

Plaintiff says that said Assessor on the 27th day of August, 1909, retrospectively assessed the estate of said L. P. Ewald, deceased, and the defendant as executor of the estate of L. P. Ewald, deceased, in the sum of \$1,000,000.00 as the amount and fair cash value of the personal property which said L. P. Ewald had failed to list with said Assessor for the fiscal year 1904, and as the amount and fair cash value of personal property owned by the said L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1904 and which was omitted from assessment by the City Assessor for

9 said year; that said Assessor did on the 27th day of August, 1909, mail a notice of said assessment to the defendant as executor of the estate of L. P. Ewald, notifying said defendant of said assessment; that said executor within thirty days after the mailing of said notice, to-wit, on the 25th day of September, 1909, filed in the Assessor's office the complaint against said assessment provided for by law; that the Board of Equalization of the City of Louisville was convened as required by law on the 26th day of November, 1909, for the purpose of passing on said complaint filed by defendant; that the defendant appeared before said Board on said date and complained of said assessment; that said Board of

Equalization, after hearing both sides, passed on said complaint and did on December 17, 1910, approve and ratify said assessment, and that thereupon said Assessor made out and duly authenticated the tax bill hereinafter described under said retrospective assessment made for said year 1904 over a fac simile of his signature according to and as required by the provisions of said ordinance of said City levying taxes for said fiscal year 1904. Said tax bill is numbered 30,277 and amounts to \$18,600.

Plaintiff states that said Assessor listed said tax bill for assessment with the Tax Receiver on or about the 1st day of March, 1910, being as soon as practicable after same had been made out as aforesaid, which tax bill is now past due together with interest and penalties thereon approved, and said tax bill remains wholly unpaid. The tax

bill mentioned above is filed herewith as part hereof, marked 10 Exhibit No. 1, and is the original tax bill made out and duly authenticated by the City Assessor as required by law and the ordinances of the City of Louisville by a stamped fac simile of his signature and by him listed with the Tax Receiver as aforesaid.

Taxes for 1905.

Plaintiff states that the General Council of the City of Louisville passed an ordinance entitled "An Ordinance providing for the assessment of property in the city of Louisville for Municipal Taxes for the Fiscal Year ending August 31, 1905," which was approved by the mayor, and became obligatory August 24, 1904, and was duly published, as provided in said act of July, 1893, in the daily Louisville Times and in the daily Louisville Anzeiger, September 1, 1904. By said ordinance the form and manner of taking the lists of taxable property in the city of Louisville by the City Assessor, for the fiscal year ending August 31, 1905, were prescribed; and on the form and in the manner prescribed in said ordinance said Assessor did, between the first day of September and the tenth day of November, 1904, take the lists and assess all the lands, improvements, personalty, franchises and investments required by law to be assessed by him, and known at the time to be assessable by him, in the City of Louisville, subject to municipal taxation.

That before the tenth day of November, 1904, or as soon thereafter as practicable, the Assessor aforesaid made out and returned not less than six assessment books and caused to be entered therein,

as near as might be in alphabetical order, the names of all 11 persons who were the owners or holders of lands, improvements, or personalty liable to be assessed, and opposite the name of each person, owner or holder, the number and block of each of the lots assessed, according to the maps in said Assessor's office, and mentioned in said act of July 1, 1893, (also designated by serial numbers in accordance with said maps, the lots not so designated at the time of the passage of said act or thereafter subdivided) the aggregate value of each parcel of land; the value thereof per front foot, when such parcel fronted on a public way; the value of the improvements; and the assessed value of the personal property.

The plaintiff states that on the 6th day of September, 1904, the Board of Aldermen of the General Council of the city of Louisville elected three citizens of the City of Louisville, viz: John McAteer, Louis E. Stine, and H. B. Bernard, to be members of the Board of Equalization of the city of Louisville for the fiscal year beginning September 1, 1904, and ending August 31, 1905; that these three citizens thus elected took the oath of office and qualified on November 14, 1904, as members of said Board of Equalization and said Board of Equalization heard, investigated, and determined all complaints filed with said Assessor by persons thinking their lands, improvements, or personal property assessed beyond their or its value, and specifying the parcel and alleged excess.

12 That the assessment books containing the assessment made as of September 1, 1904, remained open in said Assessor's office from the 15th to the 30th day of November, 1904, and the Board of Equalization aforesaid held its sittings and performed the above-mentioned work at said Assessor's office during that time, and until December 31, 1904.

And in pursuance of law, the General Council of the city of Louisville enacted "An Ordinance concerning Taxes for the Fiscal Year ending August 31, 1905," which was approved by the Mayor and became obligatory December 22, 1904, and was duly published, as provided in said act of July 1, 1893, in the daily Louisville Times and the daily Louisville Anzeiger, December 23, 1904, imposing upon all lands, improvements, personalty and franchises subject to taxation in the City of Louisville, ad valorem taxes aggregating one and 80-100 dollars on each one hundred dollars of assessed value, namely: For schools, thirty-three cents; for Sinking Fund purposes, seventeen and one-half cents; for police purposes, twenty-one cents; for fire department, twenty-five cents; for street and sewer cleaning, eleven cents; for reconstruction of streets, ten and one-half cents; for street repairs, seven cents; for construction and repair of sewers, one-half of one cent; for House of Refuge (Industrial School of Reform), four and one-half cents; for charitable institutions, nine cents; for parks, six cents; for Library purposes, three cents; for general purposes, thirty-six and one-half cents; for Firemen's pension

13 Fund three-fourths of one cent; for Board of Children's Guardians, one-fourth of one cent; for Policemen's Pension Fund, one-half of one cent; aggregating one dollar and eighty-six cents on each one hundred dollars' worth of property.

Plaintiff says that on the first day of September, 1904, the City Assessor of the City of Louisville failed and omitted to assess certain personal property belonging to the said L. P. Ewald on said date and which was assessable at the time by the City of Louisville and subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1905.

Plaintiff says that on the 27th day of August, 1909, said City Assessor retrospectively assessed said personal property which had belonged to said defendant, L. P. Ewald, as of the first day of September, 1904, at its fair cash value estimated at the price it

would being at a voluntary sale as of the first day of September of said year.

Plaintiff says that on the second day of September, 1909, the Board of Aldermen of the General Council of the City of Louisville as required by law elected three citizens of the City of Louisville, namely, H. B. Bernard, George W. Hinesley and George E. Spurrier, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1909, and ending August 31, 1910; that these three citizens thus elected took the oath of office and qualified as members of said Board of Equalization
14 and thereafter the said Board of Equalization heard, investigated and determined all complaints filed with said Assessor by persons thinking their lands, improvements and personal property erroneously assessed or assessed beyond their or its value.

Plaintiff says that said Assessor on the 27th day of August, 1909, retrospectively assessed the estate of said L. P. Ewald, deceased, and the defendant as executor of the estate of L. P. Ewald, deceased, in the sum of \$1,000,000.00 as the amount and value of the personal property which said L. P. Ewald had failed to list with said Assessor for the fiscal year 1905, and the amount and value of personal property owned by the said L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1905, and which was omitted from assessment by the City Assessor for said year; that said Assessor did on the 27th day of August, 1909, mail a notice of said assessment to the defendant as executor of the estate of L. P. Ewald notifying said defendant of said assessment; that said executor within thirty days after the mailing of said notice to-wit, on the 25th day of September, 1909, filed in the Assessor's office the complaint against said assessment provided for by law; that the Board of Equalization of the City of Louisville was convened as required by law on the 26th day of November 1909, for the purpose of passing on said complaint filed by defendant; that the defendant appeared before
said Board on said date and complained of said assessment;
15 that said Board of Equalization after hearing both sides, passed on said complaint and did on December 17, 1910, approve and ratify said assessment, and that thereupon said Assessor made out and duly authenticated the tax bill hereinafter described under said retrospective assessment made for said year 1905 over a fac simile of his signature according to and as required by the provisions of said ordinance of said City levying taxes for said fiscal year 1905. Said tax bill is numbered 17,137 and amounts to \$18,600.00.

Plaintiff states that said Assessor listed said tax bill for assessment with the Tax Receiver on or about the 1st day of March, 1910, being as soon as practicable after the same had been made out as aforesaid, which tax bill is now past due, together with interest and penalties thereon accrued, and said tax bill remains wholly unpaid. The tax bill mentioned above is filed herewith as part hereof marked Exhibit No. 2, and is the original tax bill made out and duly authenticated by the City Assessor as required by law and the ordinances of the City of Louisville by a stamped facsimile of

his signature and by him listed with the Tax Receiver as aforesaid.

Taxes for 1910.

Plaintiff states that the General Council of the City of Louisville passed an ordinance entitled "An Ordinance providing for the Assessment of property in the City of Louisville for Municipal Taxes for the Fiscal Year ending August 31, 1910," which was
16 approved by the Mayor, and became obligatory August 17, 1909, and was duly published, as provided in said act of July 1, 1893, in the daily Louisville Evening Post and in the daily Louisville Anzeiger. By said ordinance the form and manner of taking the lists of taxable property in the City of Louisville by the City Assessor, for the fiscal year ending August 31, 1910, were prescribed, and on the form and in the manner prescribed in said ordinance said Assessor did, between the first day of September, and the tenth day of November, 1909, take the lists and assess all the lands, improvements, personality, franchises, and investments required by law to be assessed by him, and known at the time to be assessable by him, in the City of Louisville, subject to municipal taxation.

Plaintiff says that on or about September 1st, 1909, said defendant as executor of the estate of said L. P. Ewald, deceased, filed with the said Assessor a schedule as required by law showing that said defendant as such executor had possession or control of certain personal property of the value of \$22,406.00.

Plaintiff says that thereafter, to-wit: on the 26th day of November, 1909, the Board of Equalization notified said defendant as such executor that it would on the 26th day of November, 1909,
17 consider the question of increasing the assessment over and above the amount shown in the list filed by said defendant with the said Assessor; that said notice was accepted by the defendant and on said date said defendant appeared before said Board of Equalization and filed its complaint with said Board, and objected to said assessment being increased. Said Board of Equalization after investigation was satisfied that the assessment was too low and thereupon on December 17, 1909, increased said assessment to \$2,456,406.00, and thereby placed a value on said personal property of \$2,456,406.00 as its fair cash value estimated at the price it would bring at a voluntary sale as of the first day of September of said year, and assessed said defendant as executor of said estate of said Ewald accordingly.

Plaintiff says that said Assessor thereupon made out a duly authenticated tax bill over a fac simile of his signature under the assessment herein set forth according to and as required by the provisions of the ordinances of the City levying taxes for said year against the defendant, Columbia Trust Company, executor of L. P. Ewald, deceased, in the sum of \$45,443.51.

In conformity with said ordinance and by reason of said assessment, there was charged against the defendant, Columbia Trust

Company, executor of the estate of L. P. Ewald, deceased the sum of \$45,433.51.

18 Plaintiff states that said Assessor listed said tax bill for assessment with the Tax Receiver on or about the 14th day of January, 1910, being as soon as practicable after same had been made out as aforesaid, which tax bill is now past due, together with interest and penalties thereon accrued, and said tax bill remains wholly unpaid. The tax bill mentioned above is filed herewith as part hereof marked Exhibit No. 3, and is the original tax bill made out and duly authenticated by the City Assessor as required by law and the ordinances of the City of Louisville by a stamped facsimile of his signature and by him listed with the Tax Receiver as aforesaid.

That before the tenth day of November, 1909, or as soon thereafter as practicable the Assessor aforesaid made out and returned not less than six assessment books, and caused to be entered therein, as near as might be in alphabetical order, the names of all persons who were the owners or holders of lands, improvements, or personalty liable to be assessed, and opposite the name of each person, owner, or holder, the number and block of each of the lots assessed, according to the maps in said Assessor's office, and mentioned in said act of July 1, 1893, (also designated by serial numbers in accordance with said maps, the lots not so designated at the time of the passage of said act or thereafter subdivided), the aggregate value of each parcel of land; the value thereof per front foot, when such parcel fronted on a public highway; the value of the improvements; and the assessed value of the personal property.

19 The plaintiff states that on the 2nd day of September, 1909, the Board of Aldermen, of the General Council of the City of Louisville, elected three citizens of the City of Louisville, viz: H. B. Bernard, George W. Hinesley and George E. Spurrier, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1909, and ending August 31, 1910; that these three citizens thus elected took the oath of office and qualified as members of said Board of Equalization, and thereafter said Board of Equalization heard, investigated and determined all complaints filed with said Assessor by persons thinking their lands, improvements or personal property assessed beyond their or its value, and specifying the parcel and alleged excess.

That the assessment books containing the assessments made as of September 1, 1909, remained open in said Assessor's office from the 15th to the 30th day of November, 1909, and the Board of Equalization aforesaid held its sittings and performed the above-mentioned work at said Assessor's office during that time, and until December 31, 1909.

And, in pursuance of law, the General Council of the City of Louisville enacted "An Ordinance concerning the taxes for the fiscal year ending August 31, 1910," which was approved by the Mayor

and became obligatory December 15, 1909, and was duly published as provided in said act of July 1, 1893, in the Daily Louisville Evening Post and the Daily Louisville Anzeiger imposing upon all lands, improvements, personalty and franchises, subject to taxation in the City of Louisville, ad valorem taxes aggregating 1.85-100 dollars on each one hundred dollars of assessed value, namely: For schools, thirty-six cents; for sinking fund, four and one-half cents; for police purposes, twenty-four cents; for fire department twenty-one and one-half cents; for street and sewer cleaning, sixteen cents; for reconstruction of streets, fourteen and one-half cents; for street repairs, eight and one-half cents; for street and sewer cleaning, sixteen cents; for reconstruction of streets, fourteen and one-half cents; for street repairs, eight and one-half cents; for construction and repair of sewers, eight and one-quarter cents; for House of Reform, four cents; for charitable institutions, seven and three-quarter cents; for parks, seven and three-quarter cents; for library purposes, three and one-half cents; for general purposes, twenty-six cents; for firemen's pension fund, one-half of one cent; for policemen's pension fund, one-half of one cent; for Board of Children's Guardians, one-quarter of one cent; for Board of Tuberculosis Hospital, one and one-half cents; aggregating \$1.85 cents on each one hundred dollars' worth of property.

Plaintiff says that the members of the respective Boards of Equalization mentioned in this petition were elected in the month of September in each of the years for which they served, by the Board of Aldermen of the City of Louisville, by a viva voce vote, which was recorded by the Clerk of the Board of Aldermen in his office, in a book kept therein by him for that purpose.

Plaintiff states that each and every one of the several ordinances mentioned in this petition was, prior to the time at which it is alleged to have been in force, duly and legally passed by the respective Boards of the General Council of the City of Louisville, at different sessions of the same, and duly approved by the Mayor of said city; that said ordinances and each of them were published on days other than Sunday, in two daily newspapers prior to the time at which they are alleged to have been in force, which two papers were then published in the City of Louisville, each of which has at the time of its election the largest bona fide circulation, both in and out of the City of Louisville, of any paper published in said city in its respective language, and at the time of said publications the newspapers hereinafter named were the official municipal advertisers of and for the City of Louisville. Said newspapers were elected in the month of May preceding, to do the public printing,

by the General Council of the City of Louisville, in joint session, upon viva voce vote, which vote was kept and duly and legally recorded in the Clerk's office of the Board of Aldermen, in a book kept therein by him for that purpose.

In the month of May, 1904, and in the month of May, 1905, and in the month of May, 1906, respectively, the Louisville Times and Louisville Anzeiger, the first a newspaper published in the English

language, and the second a newspaper published in the German language, were duly elected by the General Council of the City of Louisville as the official advertisers of said city, and all ordinances mentioned herein as having been passed by the General Council, and approved by the mayor of said city after the month of May, 1904, and until the month of May, 1907, were duly published in said last mentioned newspapers as required by law.

In the month of May, 1907, the Louisville Evening Post and Louisville Anzeiger, the first newspaper published in the English language, and the second newspaper published in the German language, were duly elected by the General Council of the City of Louisville as the official advertisers of said city, and all ordinances mentioned herein as having been passed by the General Council and approved by the Mayor of said city, after the month
23 of May, 1907, were duly published in said last mentioned newspapers as required by law.

The tax bills mentioned in this petition are filed herewith as part hereof, and are the original tax bills made out and duly authenticated by the City Assessor, as required by law, and the ordinances of the City of Louisville, by a stamped fac simile of his signature, and by him listed with the Tax Receiver as aforesaid, marked respectively: Exhibits Nos. 1, 2 and 3, respectively together with the numbers of said bills for the years for which they were assessed and levied, which tax bills are wholly unpaid.

Plaintiff says that the said tax bills herein sued on are a lien on all the property and estate in the hands of said defendant as executor of the estate of L. P. Ewald, deceased.

Wherefore, plaintiff prays judgment against the defendant for the amount of each of its tax claims filed and declared upon herein at the rate of one-half of one per cent for every month, or fraction of a month, from the 1st day of May of the year, 1910, until paid, and also for a ten per cent penalty on the face of said tax bills as follows:

24 \$18,600.00, being the face of tax bill No. 30277 for the year 1904, with interest thereon at the rate of one-half of one per cent per month, from the 1st day of May, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$18,600.00, being the face of tax bill No. 17137 for the year 1905, with interest thereon at the rate of one-half of one per cent per month, or fraction of a month, from the last day of May, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$45,433.51, being the face of tax bill No. 19920 for the year 1910, with interest thereon at the rate of one-half of one per cent per month, or fraction of a month, from the 1st day of May, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

Plaintiff further prays that its lien for said taxes, interest and penalties be enforced against the entire estate in the hands of the said defendant, Columbia Trust Company, executor under the will of said L. P. Ewald, deceased, and that enough of said estate be applied to the satisfaction of said taxes, interest and penalties as prayed for above.

12 FIDELITY & COLUMBIA TRUST CO., EXECUTOR, &C., VS.

25 Plaintiff further prays for a personal judgment against the defendant as such executor aforesaid for the amount of each of said several tax bills, interest and penalties as prayed for above, for its costs herein expended, and for all general and equitable relief.

C. B. BLAKEY,
City Attorney.

26 Said "Exhibit No. 1" filed with the foregoing Petition on the 15th day of September, 1910, is as follows, to-wit:

(Here follows tax bill, page 26.)

27 Said "Exhibit No. 2" filed with the foregoing Petition on the 15th day of September, 1910, is as follows, to-wit:

(Here follows tax bill, page 27.)

(Under Assessment made as of September 1, 1903.)

of 20th Dec 19

Ms. 30277

FOR CITY TAXES ON THE FOLLOWING PROPERTY:

YEAR.

92.18

pepper o

100

original tax bill for the
Personal Property,
Real Valuation,
and Personal Property @ \$1.86 per
year

26

| | |
|----------------------|--|
| Discount, . | |
| Interest and Cost, . | |
| Total, . | |



CITY TAX BILL FOR 1905.

(Under Assessment made as of September 1, 1904.)

Mar. 1913 7,

Charles D. McCallister, Mayor of City of Louisville, Ky.

JP would like it if this man.

In Account with **THE CITY OF LOUISVILLE, DR.**

FOR CITY TAXES ON THE FOLLOWING PROPERTY:

THE RATES FOR CURRENT FISCAL YEAR.

| | |
|---------------------------------------|--------|
| For School | \$0.33 |
| For Sinking Fund | .17% |
| For Police Purpose | .21 |
| For Fire Department | .26 |
| For St. and Sewer Cleaning | .11 |
| For Reconstruction of Sta. | .10% |
| For Street Repairs | .07 |
| For Construction and Repair of Sewers | .00% |
| For House of Reform | .04% |
| For Charitable Institutions | .09 |
| For Parks | .06 |
| For Library Purposes | .03 |
| For General Purposes | .38% |
| For Firemen's Pension Fund | .00% |
| For Board of Children's Guardians | .00% |
| For Policemen's Pension Fd. | .00% |
| TOTAL | \$1.86 |

DISCOUNT - If paid during January or the first ten working days of February, 3 per cent.; the rest of February, 2 per cent.; during all other months, 1 per cent.
INTEREST - If not paid on or before the first of March, add 1/4 per cent. for every month's fraction of a month with be added.

| Received Payment, | Amount. | Value per Foot. |
|---|---------|-----------------|
| <i>Original tax for the year ending 31-1904</i> | | |
| <i>Interest and Cost</i> | | |
| <i>Total</i> | | |
| <i>Discount</i> | | |
| <i>Interest and Cost</i> | | |
| <i>Total</i> | | |
| <i>Original tax for the year ending 31-1904</i> | | |
| <i>Interest and Cost</i> | | |
| <i>Total</i> | | |
| <i>Discount</i> | | |
| <i>Interest and Cost</i> | | |
| <i>Total</i> | | |

To Tax on \$ *Land, Imps. and Personal Prop.* @ \$1.86 per \$100, . . . \$186.00
Philip M. 2.
(27)
 RECEIVERS OF CITY TAXES.

28 Said "Exhibit No. 3" filed with the foregoing petition on the 15th day of September, 1910, is missing from the papers and therefore cannot be copied into this record.

On the 19th day of November, 1910, the following Answer was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of L. P. Ewald, Deceased,
Defendant.

Answer.

The defendant, Columbia Trust Company, Executor of L. P. Ewald's will, for answer to the petition, comes and says:

First. For answer to the first paragraph, it says it is not true that on the 1st day of September, 1903, or as of that date, the City Assessor of the City of Louisville failed or omitted to assess any personal property belonging on said date to its testator, L. P. Ewald, which was assessable at that time by the City of Louisville or subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1904, and not true that any property of said Ewald sub-
29 ject to such taxation for the fiscal year 1904 was omitted from taxation.

Second. For answer to the second paragraph, it says it is not true that on the 1st day of September, 1904, or as of that date, the City Assessor of the City of Louisville failed or omitted to assess any personal property belonging on said date to its testator, L. P. Ewald which was assessable at that time by the City of Louisville, or subject to taxation for municipal purposes, in the City of Louisville for the fiscal year 1905, and not true that any property of said Ewald subject to such taxation for the fiscal year 1905 was omitted from taxation.

Third. For further answer to the first and second paragraphs of the answer, and as to the claims of the plaintiff for taxes for the years 1904 and 1905, defendant says it is true the City Assessor of Louisville made the retrospective assessments for said years as alleged; that notice was given defendant thereof, that it complained thereof and appeared before the Board of Equalization and was heard.

It says that at said hearing, it was shown by the City Assessor and City Attorney that the said retrospective assessment was based wholly on the fact that L. P. Ewald was on September 1, 1903, and September 1, 1904, the sole stockholder of the Ewald Iron Company, a corporation organized under the laws of Kentucky, and having its principal office in Lyon County, Kentucky, and it was claimed that

30 said Company had, on the 1st day of September, 1903, and 1st day of September, 1904, the sum of One Million Dollars in cash, and it was that One Million Dollars of personal property that had been retrospectively assessed for 1904 and 1905. It was not pretended or claimed by the City Assessor or the City Attorney that said L. P. Ewald had any other property subject to retrospective assessment for either of said years, except money held and owned by the Ewald Iron Company which it was claimed was subject to assessment and taxation as against said Ewald individually because he was the only stockholder of said Ewald Iron Company, which had been, for many years, and was continuously, until long after September 1st, 1905, an existing corporation actively engaged in carrying on its corporate business and holding the title as owner of all of its property including all of its money and personal property in its own name. There was no controversy of fact in the hearing before said Board of Equalization concerning said retrospective assessments, it being conceded, and it was true, that the property sought to be retrospectively assessed as against said Ewald was money owned, held and possessed by the Ewald Iron Company, the only contention being one of law, that is, whether the fact that said Ewald was the sole stockholder of said Company on the first day of September, 1903 and 1904, subjected the personal property

31 of said company to assessment and taxation as against said Ewald, and the Board of Supervisors, none of whom were learned in the law, assumed to and did decide, as matter of law, that said Ewald, because of his being the sole stockholder in the Ewald Iron Company, was the owner of all of its personal property and that the same was for that reason subject to said retrospective assessments as against said Ewald, and through this mistake of law on the part of said Board of Equalization, it sustained said retrospective assessments.

Defendant says that all the money or personal property which was owned and held by said Ewald Iron Company on the first days of September 1903 and 1904, was, such, only as it had accumulated in the regular and natural course of business, and the title ownership and control of which it never parted with until long after September 1st, 1904.

Defendant says that the City Assessor of the City of Louisville did not omit the assessment of any personal property of L. P. Ewald that was subject to assessment and taxation by the City of Louisville for the year 1904 or the year 1903, and the said retrospective assessments so made by him for the said years, and which were sustained by the Board of Equalization were unjust and known to be so by said City Assessor and said Board of Arbitration and were made arbitrarily with full knowledge of all the facts, and in ignorance of the law, and under a mistake of the law in making and sustaining said assessments as against the estate of L. P. Ewald for the sole reason that he was the only stockholder in the Ewald Iron Company which owned and held the personal property which was intended to be, and was so assessed for the years 1904 and 1905.

Fourth. For answer to the third paragraph of the petition (taxes for 1910) the defendant says:

It is true that the Board of Equalization on the 26th of November, 1909, gave notice to defendant that it would on that day consider the question of increasing the assessment of this defendant as Executor of L. P. Ewald, over and above the amount shown on the list filed by defendant for the assessment of 1910. It is true that defendant received said note, but not true that it appeared before the Board in response to said notice; not true that it filed any complaint or that it objected to said assessment being increased, because no assessment had, in fact, been made.

Defendant says that its President and counsel appeared before said Board on the 26th day of November, 1909, to be heard on its complaint against the retrospective assessments made against defendants for the years 1904 and 1905, as alleged in the first and second
33 paragraphs of the petition, and for no other purpose, and during said hearing and while defendant's counsel was making his argument in opposition to the said retrospective assessments for 1904 and 1905, he was handed a written notice that the said Board would on that day consider the question of increasing the defendant's assessment for the year 1910. Defendant's counsel received said notice without knowing the contents thereof, and continued his argument in opposition to the retrospective assessment for 1904 and 1905.

After the conclusion of the arguments of the City Attorney and defendant's counsel as to said retrospective assessments and a decision was rendered by the Board sustaining the same, the Chairman asked defendant's counsel what he had to say in regard to the increase of defendant's assessment for 1910 and said counsel responded that he had nothing more to say and that was the full extent of the hearing in said matter.

The said notice was unreasonable and was wholly unexpected by defendant and its counsel and they did not accept the same as reasonable, or consent to any hearing at said time.

Defendant says that at said time, the City Assessor of Louisville had not acted upon the list returned by defendant, and had
34 never actually made any assessment thereon, but had verbally notified defendant that he was not satisfied with said list and could not consent to an assessment based thereon, so that, in fact, when said Board attempted to force a hearing without reasonable notice, there had never been any assessment made for the year 1910, and was, in fact, no assessment for said year which said Board did or could act on, and because of the facts herein recited, the said Board was without any jurisdiction in said matter, and its act in attempting to make any assessment or raise any assessment against this defendant for the year 1910 were and are void, and the assessment and tax bill sued on are for that reason invalid.

Fifth. Further answering the third paragraph (Taxes for 1910) defendant says:

That the action of the Board of Equalization in attempting to raise the assessment of this defendant for the year 1910, when, in

fact, no assessment had been made, was arbitrarily and unjust and made by said Board with full notice and knowledge that this defendant did not on the first day of September, 1909, own or hold any property subject to taxation other than such as was listed by it.

Said Board, in the hearing of the defendant's protest against a retrospective assessment for the years 1904 and 1905, learned
35 that defendant's testator was the sole stockholder of the Ewald Iron Company, a corporation organized under the laws of Kentucky, having its principal office in Lyon County, Kentucky, and that said Company, on the 1st day of September, 1909, had on hand a large amount of cash, but said Board did not know, and did not learn the amount of said cash, and the said Board, without any reliable information or any proper attempt to obtain the same, merely assumed and guessed that said Company had on hand \$2,465,406.00 when, in fact, said Company did not have on hand such amount by many hundreds of thousands of dollars, and said Board had no reason to believe it had.

Defendant says that on the first day of September, 1909, it had not, as Executor, received, anything whatever from said Ewald Iron Company, and did not own or hold any of the money or other personal property of said Company; that the title to all of said Company's money was in its own name and none of it in the name of, or under the control of this defendant, and the personal property assessed against defendant as of the 1st day of September, 1909, for the year 1910, and which the said Board of Equalization undertook to add to the personal property included in the list filed by defendant and to assess the same against the defendant for the year 1910

36 was, in fact, the personal property of the Ewald Iron Company, and the said Board, in so assessing the same as against this defendant, did so at the instance and under the advice of the City Attorney of Louisville, who advised said Board that because of the sole ownership of the stock of the Ewald Iron Company, its personal property was assessable and taxable against said sole owner.

The assessment made against this defendant for the year 1910, and set up in the petition, was, in fact, and by positive intent of the Board of Equalization, an attempted assessment of personal property, the title to which, as said Board well knew, was in the Ewald Iron Company, under a mistake of law on the part of said Board into which it was misled by the City Attorney, and the only reason or ground which said Board had for making or increasing any assessment against this defendant for the year 1910, was the fact that plaintiff's testator was the sole stockholder of said Ewald Iron Company, and said Board, for that reason alone, decided that defendant was subject to said increased assessment.

Wherefore defendant says that said increased assessment was made unjustly and arbitrarily and with full knowledge on the part of said Board of the fact that defendant had no more personal property than it had listed for taxation for 1910, and without any definite or reliable information as to the amount of personal
37 property of the Ewald Iron Company, the sum fixed being a mere guess, and as before stated, largely in excess of the

entire personal property of said Company; that the same was made under a mistake of law, and was altogether made in such reckless disregard of the facts and of the law, as to amount to legal fraud, and to render the action of said Board void.

Sixth. For further answer to the first and second paragraphs, claiming taxes for 1904 and 1905, defendant says:

That for the years 1904 and 1905, the City of Louisville regularly assessed the personal property of the Ewald Iron Company for taxation and it promptly paid the taxes so assessed against it.

Afterwards, in the year 1907, the City of Louisville retrospectively assessed the said Ewald Iron Company for personal property claimed by said City to have been omitted from taxation for the years 1904 and 1905, and caused tax bills to be made out against said Company for retrospective assessments for said year 1904, and 1905, and demanded payment of them, and on the 13th day of April, 1907, said Ewald Iron Company paid said tax bills to said City.

Defendant says that as heretofore stated in the third paragraph of this answer, which is here referred to and made part hereof, as if fully repeated, the retrospective assessments made against
38 *assessments made against* this defendant for the years 1904 and 1905 were, in fact retrospective assessments of property owned and held by the Ewald Iron Company, and which was subject to taxation as against it and in its name; that the personal property meant to be assessed by said retrospective assessments against defendant for 1904 and 1905, was subject to taxation in the name of, and against said Ewald Iron Company; that the City of Louisville having once exercised its right to retrospectively assess the personal property of said Ewald Iron Company in its name for the years 1904 and 1905, is not estopped from again retrospectively assessing the same for the same years against the defendant even if its testator as the sole stockholder of said company, was liable to be assessed therefor. The retrospective assessments for 1904 and 1905 against defendant were, in fact, an attempt to re-assess retrospectively property which had already been retrospectively assessed for the years 1904 and 1905 in the year 1907, and an attempt to impose double taxation by the same taxing power.

Defendant pleads and relies on the retrospective assessments so made against said Ewald Iron Company for the years 1904 and 1905 as a bar to the claim of the plaintiff based on the retrospective assessments made against defendant for said years and of the tax bills made thereunder.

39 Wherefore, defendant prays to be dismissed.

P. B. MUIR,

GIBSON, MARSHALL & GIBSON,

Attorneys for Defendants.

L. W. Botts being duly sworn, says he is President of the Columbia Trust Company, and the statements of the foregoing answer are true as he verily believes,

L. W. BOTTS,

Subscribed and sworn to before me by L. W. Botts this 19 day of November, 1910. My commission expires January 20, 1914.

[SEAL.]

E. H. BOTSON,

Notary Public, Jefferson County, Ky.

On the 31st day of March, 1911, the following Amended petition was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor, etc., Defendants.

Amended Petition.

40 Comes the City of Louisville and amends its petition herein, and for such amendment says that the tax levy for the fiscal year 1909 was \$1.75 on the \$100.00; that an additional tax was levied under a judgment of the Jefferson Circuit Court and pursuant to an ordinance approved October 22, 1909, of two cents on the \$100.00; that L. P. Ewald was on the 1st day of September, 1908, the owner of \$2,150,000.00 of personal property which on that date was subject to taxation for city purposes; that the said L. P. Ewald failed and omitted to list said personal property for taxation and that on the — day of —, 1910, the Assessor of the City of Louisville retrospectively assessed the Columbia Trust Company as executor of the estate of L. P. Ewald, with \$2,150,000.00 of personal property; that said Columbia Trust Company, the defendant herein, was notified of said assessment and having failed to complain of said assessment the same became effective and binding on the — day of —, 1910; that thereafter the City Assessor of the City of Louisville made out over a fac simile of his signature tax bill No. 32305 for \$37,625.00 and also tax bill No. "S" 32305 for \$430.00, representing the two tax levies for the fiscal year ending August 31, 1909; that said tax bills were duly listed with the Tax Receiver and are now due and wholly unpaid. Said two tax bills are filed herewith as part hereof marked respectively Exhibits X and Y.

41 Wherefore, plaintiff prays judgment against the defendant in the sum of \$37,625.00; with interest from February 19, 1911, until paid; for a 10% penalty on said \$37,625.00; and for an additional sum of \$430.00; and plaintiff prays for its costs herein expended and for all proper and equitable relief.

C. B. BLAKEY,

Attorney for Plaintiff.

At a Court held on the 31st day of March, 1911.

This action having been heard and submitted on the motion of the plaintiff for a judgment on tax bills for the years 1909 and 1910,

filed herein, and the Court being sufficiently advised, by agreement of parties it is now ordered and adjudged that the plaintiff recover of the defendant, Columbia Trust Company, Executor of the estate of L. P. Ewald, deceased, the sum of \$45,443.51 on tax bill No. 19920 for the year 1910, and also \$4,544.35, the penalty allowed thereon by law, and also \$2,499.39, being interest allowed on said tax bill by law; and the further sum of \$37,625.00, being tax bill No. 32305 for the year 1909, and \$3,762.50 being the penalty thereon as required by law, and \$376.25 being interest thereon as required by law; and also for the further sum of \$430.00, being tax bill No. "S" 32305 for the year 1909.

42 It is further adjudged that the plaintiff recover of the defendant \$8.50 costs in the above styled action, for all of which sums the plaintiff may have execution.

It is further adjudged that this action be retained on the docket for such other and further steps as may be taken in connection with the other tax bills sued on herein.

On the 5th day of June, 1911, the following Amended Petition and 3 Exhibits was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, 2nd Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Amended Petition and 3 Exhibits.

Comes the plaintiff, City of Louisville, and amends its petition herein and for such amendment says:

Taxes for 1906.

43 Par. 1. Plaintiff states that the General Council of the City of Louisville by an ordinance approved August 28, 1905, prescribed the form and manner of taking the lists of taxable property in the City of Louisville by the City Assessor; that pursuant thereto the City Assessor did between the first day of September and the tenth day of November, 1905, assess all the lands, improvements, personalty, franchises and investments required by law to be assessed by him and known to him at the time to be assessable by him in the City of Louisville, subject to municipal taxation.

That before the tenth day of November, 1905, or as soon thereafter as practicable, the Assessor made out and returned not less than six assessment books and caused to be entered therein as near as might be in alphabetical order, the names of all persons who were the owners or holders of lands, improvements, or personalty liable to

be assessed, and opposite the name of each person the number and block of each of the lots assessed and the assessed value of the personal property.

Plaintiff says that pursuant to law the General Council of the City of Louisville enacted an ordinance which was approved on December 22, 1905, by which ordinance there was imposed on all the lands, improvements, personalty and franchises subject to
44 taxation in the City of Louisville ad valorem taxes aggregating one and 80-100 dollars on each one hundred dollars of assessed value, namely: For schools, thirty-three and one-fourth cents; for Sinking Fund purposes, seventeen and one-half cents; for police purposes, twenty-two cents; for fire department, twenty-four and one-half cents; for street and sewer cleaning, thirteen cents; for reconstruction of streets, ten and one-half cents; for street repairs, seven cents; for construction and repair of sewers, one cent; for House of Refuge (Industrial School of Reform), four and one-half cents; for charitable institutions, nine cents; for parks, six cents; for library purposes, three cents; for Firemen's Pension Fund, three-fourths of one cent; for Board of Children's Guardian, one-fourth of one cent; for Policemen's Pension fund, one-half of one cent; aggregating one dollar and eighty cents on each one hundred dollars' worth of property.

Plaintiff says that on the first day of September, 1905, the City Assessor of the City of Louisville failed and omitted to assess certain personal property belonging on said date to L. P. Ewald and which was assessable at the time by the City of Louisville and subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1906.

45 Plaintiff says that on the sixth day of January, 1911, the City Assessor retrospectively assessed said personal property which had belonged to said L. P. Ewald as of the first day of September, 1905, and which had been omitted from assessment and taxation, at its fair cash value estimated at the price it would bring at a voluntary sale as of the first day of September of said year.

Plaintiff says that on the sixth day of September, 1910, the Board of Aldermen of the City of Louisville, as required by law, elected three citizens of the City of Louisville, namely, A. P. Barnard, Robt. J. McBryde and E. T. Schmitt, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1910, and ending August 31, 1911; that said three citizens thus elected took the oath of office, qualified as members of the said Board of Equalization and thereafter the said Board of Equalization heard and investigated and determined all of said complaints filed with said Board by persons thinking their lands, improvements or personal property assessed beyond their or its value.

Plaintiff says that said Assessor on the 22nd day of November, 1910, retrospectively assessed the estate of L. P. Ewald, deceased, and the defendant as executor of the said L. P. Ewald, deceased, in the sum of \$1,250,000.00 as the amount and fair cash value of
46 the personal property which said L. P. Ewald had failed to list with said Assessor for the fiscal year 1906, and as the

amount and fair cash value of personal property owned by said L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1906 which was omitted from assessment by the City Assessor for said year; that said Assessor did on the 22nd day of November, 1910, mail a notice of said assessment to the defendant as executor of the estate of L. P. Ewald notifying the said defendant of said assessment; that said executor did not within thirty days after the mailing of said notice file in the Assessor's Office, or with the Assessor any complaint against said assessment as provided for by law; that the Board of Equalization of the City of Louisville approved and ratified said assessment and that said Assessor did on the sixth day of January, 1911, make out and duly authenticate the tax bill herein-after described under said retrospective assessment over a fac simile of his signature according to and as required by the provisions of said ordinance of said City levying taxes for said fiscal year 1906. Said tax bill is numbered 8029 and amounts to \$22,500.00.

Plaintiff says that said Assessor listed said tax bill for collection with the Tax Receiver on or about the sixth day of January, 1911, being as soon as practicable after the same had been made out
 47 as appraised, which tax bill is now past due, together with interest thereon accrued, and said tax bill remains wholly unpaid. Said tax bill is filed herewith as part hereof marked Exhibit A, and is the original tax bill made out and duly authenticated by the City Assessor as required by law.

Taxes for 1907.

Par. 2. Plaintiff says that the General Council of the City of Louisville by an ordinance approved August 29, 1906, and published as required by law, prescribed the form and manner for taking the lists of taxable property in the City of Louisville by the City Assessor for the fiscal year ending August 31, 1907; that, as provided for in said ordinance, the City Assessor of the City of Louisville did between the first day of September and the tenth day of November, 1906, take the list and assess all the lands, improvements, personalty, franchises and investments required by law to be assessed by him and known at the time to be assessable by him in the City of Louisville subject to municipal taxation.

That before the tenth day of November, 1906, or as soon thereafter as practicable the Assessor made out and returned not less than six assessment books and caused to be entered thereon as near as might be in alphabetical order, the names of all persons who were owners
 48 or holders of land, improvements or personalty liable to be assessed, and opposite the name of each person, owner or holder of number and block of each of the lots assessed according to the maps in said Assessor's office and the aggregate value of each parcel of land and the assessed value of the personal property.

Plaintiff says that by an ordinance of the City of Louisville approved December 26, 1906, there was imposed upon all lands, improvements, personalty and franchises subject to taxation in the City of Louisville an ad valorem tax aggregating one and 80-100 dollars on each

one hundred dollars of assessed value, namely: For Schools, thirty-five and one-fourth cents; For Sinking Fund purposes, seventeen and one-half cents; for police purposes, twenty-one cents; for fire department, twenty-three and one-half cents; for street and sewer cleaning, twelve and one-half cents; for reconstruction of streets, ten cents; for street repairs, six cents; for construction and repair of sewers, six cents; for House of Refuge (Industrial School of Reform) four and one-half cents; for charitable institutions, eight cents, for parks, eight cents; for library purposes, three cents; for general purposes, twenty-seven and three-fourths cents; for Firemen's Pension Fund, three-fourths of one cent; for Board of Children's Guardians, one-fourth of one cent; for Policemen's Pension Fund, three-fourths of one cent; for Board of Children's Guardians, one-fourth of one cent; for Policemen's Pension Fund, one-half of one-cent; for Board of Tuberculosis Hospital, one cent; aggregating one dollars and eighty cents on each one hundred dollars' worth of property.

Plaintiff says that on the first day of September, 1906, the City Assessor of the City of Louisville, failed and omitted to assess certain personal property belonging on said date to one L. P. Ewald and which was assessable at the time by the City of Louisville and subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1907.

Plaintiff says that on the 6th day of September, 1910, the Board of Aldermen of the General Council of the City of Louisville, as required by law, elected three citizens of the City of Louisville, namely: A. P. Barnard, Robt. J. McBryde, and E. T. Schmitt, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1910, and ending August 31, 1911; that these three citizens thus elected took the oath of office and qualified as members of the said Board of Equalization and thereafter the said Board of Equalization heard and investigated and determined all complain-s filed with said Assessor by persons thinking their land, improvements and personal property erroneously assessed or assessed beyond their or its value.

50 Plaintiff says that the said Assessor of the City of Louisville on the 22nd day of November, 1910, retrospectively assessed the estate of said L. P. Ewald, deceased, and the defendant as executor of the estate of said L. P. Ewald, deceased, in the sum of \$1,500,000.00, as the amount and fair cash value of the personal property which said L. P. Ewald had failed to list with said Assessor for the fiscal year 1903, and as the amount and fair cash value of personal property owned by said L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1907, and which was omitted from assessment by the said Assessor for said year.

Plaintiff says that the property so retrospectively assessed was assessed at its fair cash value estimated at the price it would bring at a voluntary sale as of the first day of September, 1903.

Plaintiff says that said Assessor did on the 22nd day of November, 1910, mail a notice of said assessment to the defendant as executor of the estate of L. P. Ewald, deceased, notifying said defendant of

said assessment; that said defendant did not within thirty days after the mailing of said notice, file in the Assessor's office, or with the City Assessor, any complaint against said assessment as provided by law, and the Board of Equalization approved said assessment;

51 that said Assessor made out and duly authenticated the tax bill hereinafter described under said retrospective assessment over a fac simile of his signature according to and as required by law. Said tax bill is numbered 26508 and amounts to \$27,900.00.

Plaintiff says that said Assessor listed said tax bill for collection with the Tax Receiver on or about the sixth day of January, 1911, being as soon as practicable after same had been made out as aforesaid, which tax bill is now past due, together with interest and penalties thereon accrued and said tax bill remains wholly unpaid. The tax bill mentioned above is filed herewith and made part hereof marked Exhibit B and is the original tax bill made out by the City Assessor as required by law.

Tax Bill for 1908.

Par. 3. Plaintiff states that the General Council of the City of Louisville by an ordinance approved August 27, 1907, provided the manner of taking the lists of taxable property in the City of Louisville by the City Assessor for the fiscal year ending August 31, 1908; that the City Assessor of the City of Louisville did, in accordance therewith, between the first day of September and the tenth day of November, 1907, take the lists and assess all the lands, improve-

52 ments, penalty franchises and investments required by Law to be assessed by him and known at the time to be assessable by him in the City of Louisville subject to municipal taxation; that before the tenth day of November 1907, or as soon thereafter as practicable the Assessor made out and returned not less than six assessment books and caused to be entered therein the names of persons who were the owners or holders of lands or personalty liable to be assessed, and opposite the name of each person the number and block of the land assessed and the assessed value of the personal property.

Plaintiff says that in pursuance of law the General Council of the City of Louisville enacted an ordinance which was approved on December 27, 1907, imposing upon all lands, improvements and personalty or franchises subject to assessment in the City of Louisville ad valorem taxes aggregating 1 75-100 dollars on each one hundred dollars of assessed value, namely: For Schools, thirty-four cents; for Sinking Fund purposes, seven and one-fourth cents; for police purposes, twenty-two cents; for fire department, twenty four cents; for street and sewer cleaning, thirteen cents, for reconstruction of streets, twelve cents; for street repairs, eight cents; for construction and repair of sewers, three-fourths of one cent; for House of Refuge

53 (Industrial School of Reform) four cents; for charitable institutions, seven and one-half cents; for parks, seven and one-fourth cents; for library purposes, three cents; for general purposes, thirty cents; for fireman's pension fund, one-fourth of one-

cent; for Policemen's Pension Fund, one-fourth of one cent; for Board of Children's Guardians one-fourth of one cent; for Board of Tuberculosis Hospital, one and one-half cents; aggregating one dollar and seventy-five cents for each one hundred dollars' worth of property.

Plaintiff says that on the first day of September, 1907, the City Assessor of the City of Louisville failed and omitted to assess certain personal property belonging to one L. P. Ewald, on said date and which was assessable at the time by the City of Louisville and subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1908.

Plaintiff says that on the 6th day of September, 1910, the Board of Alderman of the General Council of the City of Louisville as required by law elected three citizens of the City of Louisville, namely, A. P. Barnard, Robt. J. McBryde, and E. T. Schmitt, to be members of the Board of Equalization of the City of Louisville for the fiscal year beginning September 1, 1910, and ending August 31,

54 1911; that these three citizens thus elected took the oath of office and qualified as members of said Board of Equalization and thereafter said Board *fo* Equalization heard, investigated and determined all complaints filed with said Assessor by persons thinking their lands, improvements or personal property erroneously assessed, or assessed beyond their or its value.

Plaintiff says that said Assessor on the 22nd day of November 1910, retrospectively assessed the estate of said L. P. Ewald, deceased, and defendant as the executor of the estate of said L. P. Ewald, deceased, in the sum of \$1,850,000.00 as the amount and value of personal property which said L. P. Ewald had failed to list with said Assessor for the fiscal year 1908, and the amount and value of personal property owned by said L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1908 and which was omitted from assessment by said Assessor for said year.

Plaintiff says that said amount was assessed against said defendant representing the fair cash value of said personal property estimated at the price it would bring at a voluntary sale as of the first day of September, 1907.

Plaintiff says that said City Assessor did on the 22nd day of November, 1910, mail a notice of said retrospective assessment of the defendant as executor of the estate of L. P. Ewald, deceased, notifying said defendant of said assessment; that said executor did
55 not within thirty days after the mailing of said notice file in the Assessor's office or with the City Assessor any complaint of said assessment; that the Board of Equalization of the City of Louisville approved said assessment and that said City Assessor did on or about the sixth day of January, 1911, make out and duly authenticate the tax bill hereinafter described over a fac simile of his signature according to and as required by law. Said tax bill is numbered 26621 and amounts to \$32,375.00.

Plaintiff says that said Assessor listed said tax bill for collection with the Tax Receiver on or about the sixth day of January, 1911, being as soon as practicable after same had been made out as afore-

said; that said tax bill is now past due, together with interest thereon accrued and remains wholly unpaid. The tax bill mentioned above is filed herewith as part hereof marked Exhibit C, and is the original of the tax bill made out and duly authenticated by the City Assessor as required by law.

Plaintiff says that the members of the respective Boards of Equalization mentioned in this petition were elected in the month of September in each of the years for which they served, by the Board of Aldermen of the City of Louisville, by a viva voce vote, which was recorded by the Clerk of the Board of Alderman, in his office, in a book kept therein by him for that purpose.

53 Plaintiff states that each and every one of the several ordinances mentioned in this petition was, prior to the time at which it is alleged to have been in force, duly and legally passed by the respective Boards of the General Council of the City of Louisville, at different sessions of the same, and duly approved by the Mayor of said city; that said ordinances and each of them were published on days other than Sunday, in two daily newspapers, prior to the time at which they are alleged to have been in force, which two papers were then published in the City of Louisville, each of which had at the time of its election the largest bona fide circulation, both in and out of the City of Louisville, of any paper published in said city in its respective language, and at the time of said publications said newspapers were the official municipal advertisers and for the City of Louisville. Said newspapers were elected in the month of May preceding, to do the public printing, by the General Council of the City of Louisville, in joint session, upon viva voce vote, which vote was kept and duly and legally recorded in the Clerk's office of the Board of Alderman, in a book kept therein by him for that purpose.

Plaintiff says that said tax bills sued on herein are a lien on all the property and estate in the hands of said defendant as executor of the estate of L. P. Ewald, deceased.

57 Wherefore, plaintiff prays judgment against the defendant for the amount of each of the tax claims filed and declared upon herein and for interest thereon at the rate of one-half of one per cent for every month, or fraction of a month, from the first day of May, of the year 1911 until paid, and also for a ten per cent penalty on the face of said tax bills unless paid prior to July 1st, 1910, as follows:

\$22,500.00, being the face of tax bill No. 8029 for the year 1906, with interest thereon at the rate of one-half of one per cent per month, or fraction of a month, from the first day of May, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill unless same is paid prior to July 1, 1911.

\$27,900, being the face of tax bill No. 25508 for the year 1907, with interest thereon at the rate of one-half of one per cent per month or fraction of a month, from the 1st day of May, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill unless same is paid prior to July 1, 1911.

\$32,375.00, being the face of tax bill No. 19920 for the year 1908, with interest thereon at the rate of one-half of one per cent per month,

or fraction of a month, from the 1st day of May, 1911, until paid, and also a ten per cent penalty on the face of said tax bill.

58 Plaintiff further prays that its lien for said taxes, interest and penalty be enforced against the entire estate in the hands of said executor under the will of said L. P. Ewald, deceased, and that said estate, or enough thereof, be applied to the satisfaction of said tax bills, interest and penalties as prayed for.

Plaintiff further prays for personal judgment against the defendant as said executor aforesaid for the amount of each of said several tax bills, interest and penalties as prayed for above, for its costs herein expended and for all general and equitable relief.

C. B. BLAKEY,
City Attorney.

59 Said "Exhibit A" filed with the foregoing Amended Petition on the 5th day of June, 1911, is as follows, to-wit:

(Here follows tax bill, page 59).

60 Said "Exhibit B" filed with the foregoing Amended Petition on the 5th day of June, 1911, is as follows: to-wit:

(Here follows tax bill, page 60).

61 Said "Exhibit C" filed with the foregoing Amended Petition on the 5th day of June, 1911, is as follows: to-wit:

(Here follows tax bill, page 61).

CITY TAX BILL FOR 1906.

(Under Assessment made as of September 1, 1905.)

Wm. J. O'Connell, Clerk of the City
St. Bernard's School, 4th Street

In Account with **THE CITY OF LOUISVILLE, KY.**

FOR CITY TAXES ON THE FOLLOWING PROPERTY:

*Filed with
 Feb 14-1911
 City Attorney*

*original tax bill for the
 year ending Aug 31st 1906
 Personal Property omitted
 Total Valuation*

TAX RATES FOR CURRENT FISCAL YEAR

| | |
|---|---------------|
| For Schools..... | \$0.35 1/4 |
| For Sinking Fund..... | .17 1/2 |
| For Police Purposes..... | .22 |
| For Fire Department..... | .21 1/2 |
| For St. and Sewer Cleaning..... | .12 |
| For Reconstruction of Sts..... | .10 1/2 |
| For Street Repairs..... | .07 |
| For Construction and Re- pair of Sewers..... | .01 |
| For House of Reform..... | .04 1/2 |
| For Charitable Institutions..... | .09 |
| For Parks..... | .06 |
| For Library Purposes..... | .03 |
| For General Purposes..... | .27 1/4 |
| For Firemen's Pension Fd..... | .00 1/4 |
| For Board of Children's Guardians..... | .00 1/4 |
| For Policemen's Pension Fd..... | .00 1/2 |
| TOTAL..... | \$1.80 |

DISCOUNT.—If paid during Jan-
uary or the first ten working days
of February, 3 per cent; the rest
of February, 2 per cent; during
March, 1 per cent.

INTEREST.—If not paid on or be-
fore May 1, 1906, interest at the rate
of 1/2 per cent. for every month or
fraction of a month will be added.

Q. A.

(59)

Received Payment.....

Discount.....

Interest and Cost.....

Total.....

RECEIVED OF CITY TAXES.

To Tax on *\$22,500.00* Lands, Imps. and Personal Prop. @ \$1.80 per \$100. - - -

Personal Property omitted

Total Valuation

\$16,854.40

\$22,500.00

Fraction of a month will be added.

Received Payment.

RECEIPTS OF NEW YORK.

Total. -

CITY TAX BILL FOR 1907.

(Under Assessment made as of September 1, 1906.)

Could & D. P. C. Municipal Bonds. Cleared by the City of Louisville. No. 26508. J. D. Board, Treasurer of the City of Louisville.

IN ACCOUNT WITH THE CITY OF LOUISVILLE, DR.

FOR CITY TAXES ON THE FOLLOWING PROPERTY:

| | |
|--|---------|
| For Schools..... | \$0.35% |
| For Sinking Fund..... | .17% |
| For Police Purposes..... | .21 |
| For Fire Department..... | .23% |
| For St. and Sewer Cleaning..... | .12% |
| For Reconstruction of Sts..... | .10 |
| For Street Repairs..... | .06 |
| For Construction and Repair of Sewers..... | .00% |
| For House of Reform..... | .04% |
| For Charitable Institutions..... | .08 |
| For Parks..... | .08 |
| For Library Purposes..... | .03 |
| For General Purposes..... | .27% |
| For Firemen's Pension Fund..... | .00% |
| For Board of Children's Guardians..... | .00% |
| For Policemen's Pension Fd..... | .00% |
| For Board of Tuberculous Hospital..... | .01 |
| TOTAL..... | \$1.80 |

Filed with Feb 14-1911 City Attorney

Original tax bill for 1907. Personal Property, omitted. Total Valuation, \$1,651.22

To Tax on \$1,651.22 Lands, Imps. and Personal Prop., @ \$1.80 per \$100, -

\$2.97

Ed. D. Jones 6-11 Ball. Nov 22 to notice

(62)

Interest and Cost, -

\$ -

Received Payment, -

Total, -

\$ -



CITY TAX BILL FOR 1908.

(Under Assessment made as of September 1, 1907.)

NO. 2 6621

Could L.O. and Charles Street & Chester of estate of L.O. Charles Street & Chester of estate

44 Main

In Account with **THE CITY OF LOUISVILLE, DR.**

FOR CITY TAXES ON THE FOLLOWING PROPERTY.

TAX RATES FOR CURRENT FISCAL YEAR.

| | |
|--|---------------|
| For Schools..... | \$0.34 |
| For Sinking Fund..... | .07 1/2 |
| For Police Purposes..... | .22 |
| For Fire Department..... | .24 |
| For St. and Sewer Cleaning..... | .13 |
| For Reconstruction of Streets..... | .12 |
| For Street Repairs..... | .08 |
| For Construction and Repair of Sewers..... | .00 1/2 |
| For House of Reform..... | .04 |
| For Charitable Institutions..... | .07 1/2 |
| For Parks..... | .07 1/2 |
| For Library Purposes..... | .03 |
| For General Purposes..... | .30 |
| For Firemen's Pension Fund..... | .00 1/2 |
| For Policemen's Pension Fund..... | .00 1/2 |
| For Board of Children's Guardians..... | .00 1/2 |
| For Board of Tuberculosis Hospital..... | .01 1/2 |
| TOTAL..... | \$1.76 |

DISCOUNT—If paid during January or the first ten working days of February, 3 per cent; the rest of February, 2 per cent; during March, 1 per cent.

INTEREST—If not paid on or before May 1, 1908, interest at the rate of 1/2 per cent for every month or fraction of a month will be added.

Improvements

Filed with City Attorney 14-1911

Personal Property, omitted

Total Valuation,

To Tax on \$84,772.00 Lands Improv. and Personal Prop., @ \$1.75 per \$100 -

\$148,350.00

original tax bill for the year ending August 31, 1908

Discount, -

Interest and Cost, -

Total, -

\$32,375.00

(61)

Received Payment

RECEIVED OF CITY TAXES.



62 On the 25th day of November, 1911, the following Amended Answer was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Amended Answer.

The defendant, Columbia Trust Company, as Executor under the will of L. P. Ewald, deceased, for answer to paragraph one of the petition as amended herein -ays:

Taxes for 1906.

Paragraph First: It is not true that on the 1st day of September, 1905, or as of that date, the City Assessor of the City of Louisville, failed or omitted to assess certain or any personal property belonging on that date to L. P. Ewald, or any property which was assessable at that time by the City of Louisville or subject to assessment for taxation for municipal purposes in the City of Louisville for the fiscal year 1906.

63 Defendant denies that on the 6th day of January, 1911, the City Assessor retrospectively assessed any personal property which had belonged to said L. P. Ewald as of the 1st day of September, 1905, or which had been omitted from assessment or taxation, at its fair cash value estimated at the price it would bring at a voluntary sale as of the 1st day of September of said year.

Defendant denies that the Assessor of the City of Louisville on the 22nd day of November, 1910, retrospectively assessed the estate of L. P. Ewald, deceased, or this defendant as Executor of L. P. Ewald, deceased, in the sum of \$1,250,000 or any sum as the amount of fair cash value of the personal property which L. P. Ewald failed to list with the City Assessor for the fiscal year 1906, or as the amount of fair cash value of personal property owned by L. P. Ewald subject to taxation for the fiscal year 1906, which was omitted from assessment by the City Assessor for said year, or that said Assessor did, on the 22nd day of November, 1910, mail a notice of said assessment to this defendant as Executor of the estate of L. P. Ewald, notifying it of said assessment, or made any other retrospective assessment except as will hereafter appear. Defendant says it is not true that it did not, within thirty days after the mailing of said notice, file in the Assessor's office or with the Assessor, any complaint against said assessment, as provided by law, as will hereafter appear.

64 Defendant says it has no knowledge or information sufficient to form a belief as to whether or not the Board of Equali-

zation of the City of Louisville approved or ratified said assessment pleaded in paragraph one of the amended petition herein, or whether or not said tax bill is numbered 80029, or whether or not the tax bill made out pursuant to said alleged assessment is numbered 80029 or amounts to \$22,500 or any sum.

Paragraph Second. For further answer to paragraph one of the amended petition, this defendant says that on the 22nd day of November, 1910, when it appeared by counsel in the Assessor's office of the City of Louisville to protest against the alleged retrospective assessments for the years 1904, 1905, 1909 and 1910, and after it had objected to the retrospective assessments against it as Executor of the estate of L. P. Ewald on account of the years 1904 and 1905 and after all the facts set up in paragraph 3 of its original answer had transpired, notice was served upon it that subsequent to the retrospective assessments covering the years 1904 and 1905, the City had retrospectively assessed the estate of L. P. Ewald on account of the year 1906, whereupon it objected to said assessment on the same ground set out in paragraphs 3 of the original answer herein, which is adopted as a part of this paragraph as fully as if written herein.

65

Defendant says that the plaintiff, by its petition as amended now claims that the retrospective assessment for the year 1906 against L. P. Ewald was made by the City Assessor of the City of Louisville and sustained by the Board of Equalization on the theory that stock of L. P. Ewald, deceased, which he owned in the Ewald Iron Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky, and having its principal place of business in Lyon County, Kentucky, and certain of its property located in Lyon County, and certain other of its property located in Jefferson County, Kentucky, and in St. Louis, Missouri, was subject to assessment in the hands of L. P. Ewald because the Ewald Iron Company had failed to pay taxes on all of its property as provided by Section 4085 of the Kentucky Statutes, and for that reason, that L. P. Ewald's shares of stock in said corporation were liable to taxation and did not come within the provisions of section 4088 of the Kentucky Statutes. Defendant shows, however, in paragraph number 12 of its answer herein, that said retrospective assessment was not so made, but says that if so made, it is invalid because the Ewald Iron Company made a proper return of its taxable property assessable at its home office, to the Assessor of Lyon County, Kentucky, and thereafter paid the assessment for the year 1906 which said Assessor

66

made against said corporation; that subsequently one J. F. Hawn, a Revenue Agent for the State at Large, brought an action in Lyon County, Kentucky, styled Commonwealth of Kentucky upon relation of J. F. Hawn, Revenue Agent for the State at large, v. Ewald Iron Company, alleging that the Ewald Iron Company omitted certain property for taxation which was owned by it, whereupon a trial was duly had in the Lyon County Court and it was adjudged that the Ewald Iron Company had omitted certain property owned by it as of the first day of September, 1905, and judgment was entered against the Ewald Iron Company on account of said omission, and thereafter said judgment was satisfied by the

payment of the amount thereof to the Commonwealth of Kentucky.

Defendant says that the Ewald Iron Company also regularly listed with the City Assessor of the City of Louisville all property owned by it in Jefferson County, Kentucky, as of the 1st day of September, 1905, and the City Assessor made out tax bills against the Ewald Iron Company, which tax bills were thereafter paid.

Defendant now pleads and relies upon said original assessments and said suit against the Ewald Iron Company in bar of any further assessment against the stockholders of the Ewald Iron Company on account of stock owned by them in the Ewald Iron Company, and

67 says that by reason of said assessments against the Ewald Iron Company, and said suit, the taxing power of the Commonwealth of Kentucky and of any sub-division thereof, has exhausted its right to further taxation against the property of the Ewald Iron Company or the stock of any holder of the capital stock in that company.

Taxes for 1907.

Paragraph Third. For answer to paragraph 2 of the petition as amended herein, defendant says it is not true that on the 1st day of September, 1906, or as of that date, the City Assessor of the City of Louisville failed or omitted to assess certain or any personal property belonging on that date to L. P. Ewald, or that any property was assessable at that time by the City of Louisville or subject to taxation for municipal purposes in the city of Louisville for the fiscal year 1907.

Defendant denies that the Assessor of the City of Louisville, on the 22nd day of November, 1910, retrospectively assessed the estate of L. P. Ewald, deceased, or the defendant as Executor of the estate of L. P. Ewald, in the sum of \$1,550,000 or in any sum, as the amount or fair cash value of the personal property which L. P. Ewald had failed to list with the City Assessor for the fiscal year 1907, or as the amount or fair cash value of personal property owned by L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1907, or which was omitted from assessment by the City

Assessor for said year.

68 Defendant denies that the property so retrospectively assessed was assessed at its fair cash value or estimated at the price it would bring at a fair voluntary sale as of the 1st day of September, 1903; denies that the City Assessor did, on the 22nd day of November, 1910, mail a notice of said assessment to this defendant as Executor of the estate of L. P. Ewald, deceased, notifying it of said assessment, or that this defendant did not, within thirty days after the mailing of the notice, file in the Assessor's office or with the City Assessor any complaint against said assessment as provided by law.

Defendant says it has no knowledge or information sufficient to form a belief as to whether or not thereafter the Board of Equalization approved the alleged assessment, as will hereafter appear, or whether the tax bill as made out upon the alleged retrospective assess-

ment is numbered 26508 or amounts to the sum of \$27,900 or any sum.

Paragraph Fourth. For further answer to Paragraph two of the amended petition, this defendant says that on the 22nd day of November, 1910, which it appeared by counsel in the Assessor's office of the City of Louisville to protest against the alleged retrospective assessments for the years 1904, 1905, 1909, and 1910, and after it had objected to the retrospective assessments against it as Executor

69 of the estate of L. P. Ewald on account of the years 1904 and 1905, and after all the facts set up in paragraph 3 of its original answer had transpired, notice was served upon it that subsequent to the retrospective assessments covering the years 1904 and 1905, the City had retrospectively assessed the estate of L. P. Ewald on account of the year 1907, whereupon it objected to said assessment on the same ground set out in paragraph 3 of the answer herein, which is adopted as a part of this paragraph as fully as if written herein.

Defendant says that the plaintiff, by its petition as amended claims that the retrospective assessment for the year 1907 against L. P. Ewald was made by the City Assessor of the City of Louisville and sustained by the Board of Equalization on the theory that stock of L. P. Ewald, deceased, which he owned in the Ewald Iron Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky, and having its principal place of business in Lyon County, Kentucky, and certain of its property located in Lyon County, and certain other of its property located in Jefferson County, Kentucky, and in St. Louis, Missouri, was subject to assessment in the hands of L. P. Ewald because the Ewald Iron Company had failed to pay taxes on all of its property as provided by Section 4085 of the Kentucky Statutes, and for that reason, that L. P. Ewald's shares of stock in said corporation were liable to taxation and did not

70 come within the provisions of Section 4088 of the the Kentucky Statutes. Defendant shows, however, in paragraph 12 of its answer herein that said retrospective assessment was not so made, but that if so made, *but that if so made*, it is invalid because the Ewald Iron Company made a proper return of its taxable property assessable at its home office, to the Assessor of Lyon County, Kentucky, and thereafter, paid the assessment for the year 1907, which said Assessor made against said corporation; that subsequently one Arthur E. Hopkins, a Revenue Agent for the State at Large, brought an action in Lyon County, Kentucky, styled Commonwealth of Kentucky upon relation of Arthur E. Hopkins, Revenue Agent for the State at Large, v. Ewald Iron Company, alleging that the Ewald Iron Company omitted certain property for taxation which was owned by it, whereupon a trial was duly had in the Lyon County Court and it was adjudged that the Ewald Iron Company had omitted certain property owned by it as of the first day of September, 1906, and judgment was entered against the Ewald Iron Company on account of said omission, and thereafter said judgment was satisfied by the payment of the amount thereof to the Commonwealth of Kentucky.

71 Defendant says that the Ewald Iron Company also regularly listed with the City Assessor of the City of Louisville all property owned by it in Jefferson County, as of the 1st day of September, 1906, and the City Assessor made out tax bills against the Ewald Iron Company, which tax bills were thereafter paid.

Defendant now pleads and relies upon said original assessments and said suit against the Ewald Iron Company in bar of any further assessment against the stockholders of the Ewald Iron Company on account of stock owned by them in the Ewald Iron Company, and says that by reason of said assessments against the Ewald Iron Company, and the said suit, the taxing power of the Commonwealth of Kentucky and of any subdivision thereof, has exhausted its right to further taxation against the property of the Ewald Iron Company or the stock of any holder of the capital stock in that company.

Taxes for 1908.

Paragraph Fifth. For answer to paragraph 3 of the petition as amended herein, the defendant says it is not true that on the first day of September, 1907, or as of that date, the City Assessor of the City of Louisville failed or omitted to assess certain or any personal property belonging to L. P. Ewald, on that date, or which was assessable at that time by the City of Louisville, or which was subject to taxation for municipal purposes in the City of Louisville for the fiscal year 1908.

72 Defendant denies that the City Assessor, on the 22nd day of November, 1910, retrospectively assessed the estate of L. P. Ewald, deceased, or the defendant as Executor of the estate of L. P. Ewald, deceased, in the sum of \$1,850,000, or any sum, as the amount or value of personal property which L. P. Ewald had failed to list with the City Assessor for the fiscal year 1908, or the amount or value of personal property owned by L. P. Ewald subject to taxation by the City of Louisville for the fiscal year 1908, or which was omitted from assessment by the Assessor for said year. Defendant denies that said amount or any amount was assessed against this defendant or L. P. Ewald, deceased, or represents the fair cash value of said personal property estimated at the price it would bring at a voluntary sale as of the 1st day of September, 1907.

Defendant denies that the City Assessor did, on the 22nd day of November, 1910, mail a notice of said retrospective assessment to this defendant as Executor of the estate of L. P. Ewald, deceased, notifying the defendant of said assessment, or that the defendant did not, within thirty days after the mailing of said notice, file in the Assessor's office or with the City Assessor any complaint of said assessment.

73 Defendant says it has no knowledge of information sufficient to form a belief as to whether or not the Board of Equalization of the City of Louisville approved said assessment, or whether or not the tax bill which was made out in pursuance of said retrospective assessment is numbered 26621 or amounts to \$32,375 or any sum, as will hereafter appear.

Paragraph Sixth. For further answer to paragraph three of the petition as amended, this defendant says that on the 22nd day of November, 1910, when it appeared by counsel in the Assessor's office of the City of Louisville to protest against the alleged retrospective assessments for the years 1904, 1905, 1909, and 1910, and after it had objected to the retrospective assessments against it as Executor of the estate of L. P. Ewald on account of the years 1904 and 1905, and after all the facts set up in paragraph 3 of its original answer had transpired, notice was served upon it that subsequent to the retrospective assessments covering the years 1904 and 1905, the City had retrospectively assessed the estate of L. P. Ewald on account of the year 1908, whereupon it objected to said assessment on the same ground set out in paragraph 3 of the original answer herein, which is adopted as a part of this paragraph as fully as if written herein.

74 Defendant says that plaintiff, by its petition as amended, now claims that the retrospective assessment for the year 1908 against L. P. Ewald, was made by the City Assessor of the City of Louisville and sustained by the Board of Equalization on the theory that stock of L. P. Ewald, deceased, which he owned in the Ewald Iron Company a corporation organized and existing under the laws of the Commonwealth of Kentucky, and having its principal place of business in Lyon County, Kentucky, and certain of its property located in Lyon County, and certain other of its property located in Jefferson County, Kentucky, and in St. Louis, Missouri, was subject to assessment in the hands of L. P. Ewald because the Ewald Iron Company had failed to pay taxes on all of its property as provided by Section 4085 of the Kentucky Statutes, and that L. P. Ewald's shares of stock in said corporation were liable to taxation and did not come within the provisions of Section 4088 of the Kentucky Statutes. Defendant shows, however, by paragraph number 12 of its answer herein, that said retrospective assessment was not so made, but says that if so made, it is invalid because the Ewald Iron Company made a proper return of its taxable property assessable at its home office, to the Assessor of Lyon County, Kentucky, and thereafter paid the assessment for the year 1908, which said

75 Assessor made against said corporation; that subsequently one Arthur E. Hopkins, a Revenue Agent for the State at Large, brought an action in Lyon County, Kentucky, styled Commonwealth of Kentucky upon relation of Arthur E. Hopkins, Revenue Agent for the State at Large, v. Ewald Iron Company, alleging that the taxation which was owned by it, whereupon a trial was duly had in the Lyon County Court and it was adjudged that the Ewald Iron Company had omitted certain property owned by it as of the first day of September, 1907, and judgment was entered against the Ewald Iron Company on account of said omission, and thereafter said judgment was satisfied by the payment of the amount thereof to the Commonwealth of Kentucky.

Defendant says that the Ewald Iron Company also regularly listed with the City Assessor of the City of Louisville all property owned by it in Jefferson County, Kentucky, as of the 1st day of September,

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and the City Assessor made out tax bills against the Ewald Company, which tax bills were thereafter paid. Defendant now pleads and relies upon said original assessments and said suit against the Ewald Iron Company in bar of any further judgment against the stockholders of the Ewald Iron Company on account of stock owned by them in the Ewald Iron Company, and says that by reason of said assessments against the Ewald Iron Company, and said suit, the taxing power of the Commonwealth of Kentucky and of any sub-division thereof, has exercised its right to further taxation against the property of the Ewald Iron Company or the stock of any holder of the capital stock of said company.

Taxes for 1904.

Paragraph Seventh. The defendant for further answer to the original petition, and particularly for further answer to paragraph hereof, says that the property of L. P. Ewald, sought to be rev-
erely assessed against this defendant by the Assessor of the City of Louisville on the 27th day of August, 1909, was capital stock of the Ewald Iron Company owned by the decedent, L. P. Ewald. Defendant says that at all times hereinafter mentioned, particularly September 1, 1903, and as of that date, the Ewald Iron Company was a corporation organized and existing under the laws of the Commonwealth of Kentucky, having its principal place of business in Lyon County, Kentucky, and that it made a proper return of its real property assessable at its home office to the Assessor of Lyon County, Kentucky, and thereafter paid the assessment for the year 1903, which said Assessor made against the Ewald Iron Company; and thereafter one J. F. Hawn, a Revenue Agent for the State at large, filed an action in the Lyon County Court styled Commonwealth of Kentucky upon relation of J. F. Hawn, Revenue Agent for the State at Large, v. Ewald Iron Company, wherein he sought a judgment against the Ewald Iron Company on account of property owned by it as of September 1, 1903, and thereafter a trial was had of said action in the Lyon County Court and it was adjudged and decreed that said Ewald Iron Company had omitted certain property which was taxable in Lyon County as of September 1, 1903, whereupon judgment was entered against the Ewald Iron Company on account of said omission, which judgment was thereafter affirmed by the Ewald Iron Company.

Defendant pleads and relies upon the original assessment of the Ewald Iron Company in Lyon County and to the judgment entered in the suit above referred to against the Ewald Iron Company as a bar to any further proceedings on behalf of the Commonwealth of Kentucky or any sub-division of its taxing power on account of taxes on the capital stock of said corporation owned by any stockholder of said company.

Paragraph Eighth. For further answer to paragraph one of the original petition, this defendant says that its decedent, L. P. Ewald, was early listed with the City Assessor of the City of Louisville his

taxable property as of the 1st day of September, 1903, and thereafter the City Assessor made out tax bills against its decedent, which tax bills were regularly paid; that thereafter the Assessor of the City of Louisville in or about April, 1907, acting under the authority conferred upon him by Section 2991 of the Kentucky Statutes, retrospectively assessed property of its decedent, L. P. Ewald, which said Assessor claimed was property which L. P. Ewald had omitted from taxation as of the 1st day of September, 1903; that thereafter a new tax bills based on said respective assessment was made out against L. P. Ewald, and paid by him, and this defendant now pleads and relies upon said original assessment against L. P. Ewald and the retrospective assessment, as a bar to any further assessments against L. P. Ewald or this defendant as Executor of L. P. Ewald, and particularly as a bar to the retrospective assessment sued on herein.

Taxes for 1905.

Paragraph Ninth. The defendant for further answer to the original petition and particularly for further answer to paragraph two thereof, says that the property of L. P. Ewald sought to be retrospectively assessed against this defendant by the Assessor of the City of Louisville on the 27th day of August, 1909, was capital stock of the Ewald Iron Company owned by the decedent, L. P. Ewald. Defendant says that at all times hereinafter mentioned, particularly on September 1, 1904, and as of that date, the Ewald Iron Company was a corporation organized and existing under the laws of the Commonwealth of Kentucky, having its principal place of business in Lyon County, Kentucky, and that it made a proper return of its taxable property assessable at its home office to the Assessor of Lyon County, Kentucky, and thereafter paid the assessment for the year 1905, which said Assessor made against the Ewald Iron Company; that thereafter one J. F. Hawn, a Revenue Agent for the State at Large, filed an action in the Lyon County Court styled Commonwealth of Kentucky upon relation of J. F. Hawn, Revenue Agent for the State at Large v. Ewald Iron Company, wherein he sought a judgment against the Ewald Iron Company on account of property owned by it as of September 1, 1904, and thereupon a trial was had of said action in the Lyon County Court and it was adjudged and decreed that said Ewald Iron Company had omitted certain property which was taxable in Lyon County as of that date, whereupon judgment was entered against the Ewald Iron Company on account of said omission, which judgment was thereafter paid by the Ewald Iron Company.

Defendant pleads and relies upon the original assessment of the Ewald Iron Company in Lyon County and on the judgment entered in the suit above referred to against Ewald Iron Company as a bar to any further proceedings on behalf of the Commonwealth of Kentucky or any sub-division of its taxing power on account of taxes on the capital stock of said corporation owned by any stockholder thereof.

80 Paragraph Tenth. For further answer to paragraph two of the original petition, this defendant says that its decedent, L. P. Ewald, regularly listed with the City Assessor of the City of Louisville his taxable property as of the 1st day of September, 1904, and thereafter the City Assessor made out tax bills against its decedent, which tax bills were regularly paid; that thereafter the Assessor of the City of Louisville in or about April, 1907, acting under the authority conferred upon him by Section 2991 of the Kentucky Statutes, retrospectively assessed property of its decedent, L. P. Ewald which said Assessor claimed was property which L. P. Ewald had omitted from taxation as of the 1st day of September, 1904; that thereafter a new tax bill based on said retrospective assessment was made out against L. P. Ewald and paid by him, and this defendant now pleads and relies upon said original assessment against L. P. Ewald and the retrospective assessment, as a bar to any further assessments against L. P. Ewald or this defendant as Executor of L. P. Ewald, and particularly as a bar to the retrospective assessment sued on herein.

Paragraph Eleventh. Further answering each and every paragraph of the petition, defendant says:

That for each and every year that the plaintiff has retrospectively assessed L. P. Ewald's estate, as set out in the petition, the Ewald Iron Company was duly assessed for taxation by the City Assessor of Louisville on all of its tangible property located in the City of Louisville, Kentucky, and said taxes were paid by the Ewald Iron Company.

The property of the Ewald Iron Company sought to be assessed as against L. P. Ewald's estate, and the taxes on which are sought to be recovered herein, was intangible property, to-wit: money deposited in bank in Saint Louis, Missouri, where said Ewald Iron Company had a branch of its business and maintained an office and extensive plant.

Said money represented the surplus accumulations of said company, which were not in any manner connected with, or treated or considered as, any part of the assets of the business of said company conducted in Louisville, Kentucky, and not used to finance said business, but said money was carried on the company's books at its said Saint Louis branch, and not elsewhere, as part of the assets of said Saint Louis branch.

Defendant says that if said money was subject to taxation in Kentucky at all, it was taxable only in Lyon County, Kentucky, where said company's principal office was, and if there was any duty on the part of L. P. Ewald to list his shares of stock in said company because of its failure to list any of its intangible property for 82 taxation, then it was his duty to list said shares in Lyon County and not in Jefferson County, and defendant says that any assessment of said shares of stock by the city of Louisville was and is void.

Defendant further states that at the time each and all of said retrospective assessments were made, said L. P. Ewald was dead, that said Ewald Iron Company still existed for the purposes of liquidation

and still owned ample property out of which the taxes claimed herein could have been satisfied if said company owed them, that no attempt was made by the City Assessor of Louisville to assess said company with the money aforesaid or to collect from it the taxes herein sued for.

Paragraph Twelfth. Further answering each and every paragraph of the petition, further says:

That when it was notified of the various retrospective assessments made by the City Assessor of Louisville, it appeared before the Board of Equalization of said City within the time given it to do so, and protested against said assessments and demanded to be informed as to what personal estate of L. P. Ewald was embraced in said assessments, at the same time avowing its ignorance of any personal estate of said Ewald which was omitted from assessment for either of said years and denying that any such personal estate had been omitted for either of the years for which said retrospective assessments had been made.

83 Defendant further avowed that the City Assessor had no knowledge or information of any fact to justify him in making said retrospective assessments, but had based the same on mere rumor and suspicion, and asked that *based the same on mere rumor and suspicion*, and asked that said City Assessor be called before the Board, and be required to inform defendant what personal estate of L. P. Ewald had been retrospectively assessed by him. The deputy of the City Assessor who made said assessments being called before the Board, declined and refused, under the advise and direction of the City Attorney to give any information or make any statement whatever concerning said retrospective assessments. Defendant appealed to the Board of — to require said deputy assessor to inform it what personal property of L. P. Ewald had been intended to be retrospectively assessed by him in order that defendant might have an opportunity to show that said assessments were improper and not justified, but said Board arbitrarily refused so to do, and would not allow defendant to ascertain, and it did not know, what personal property was intended to be or was assessed as aforesaid.

Thereupon defendant's President, the officer having active charge of the estate of L. P. Ewald, was sworn and testified that he knew of no personal estate of said Ewald subject to taxation
84 that had been omitted from assessment for either of the years 1903 to 1908, inclusive. In the course of his examination, it was shown that said Ewald was a large stockholder and for a time the sole stockholder of the Ewald Iron Company of Lyon County, Kentucky, and that at his death in July 1909, said Company had over \$2,000,000 on deposit in various banks in Saint Louis, Missouri. It did not appear whether said Company had said money or any of it on hand or on deposit at any previous assessment period.

Defendant supposed, but did not know, that said assessments had been made against L. P. Ewald on the theory that he being the sole stockholder of the company was individually the owner of all of its property including its money, and that the same was subject to assessment as his property, and defendant never heard until the

amended petition herein was filed, that said assessments were intended as assessments of the shares of the said Ewald in the Ewald Iron Company, and never had any opportunity to show that such assessments were unauthorized. Nothing was said at said hearing to indicate that said assessments were intended as assessments of shares of stock in the Ewald Iron Company, and defendant says there was no purpose to make any such assessments but that the claim made in the amended petition that said assessments were so
 85 intended was and is an afterthought and a pretense on the part of the plaintiff made to avoid the effect of a decision of the Court of Appeals rendered after said assessments were made.

Wherefore, having fully answered, this defendant prays to be dismissed hence, with its costs herein expended and for all proper relief.

GIBSON, MARSHALL & CRAWFORD,
Attorneys for Defendant.

L. M. Ruder, being duly sworn, says he is Secretary of the Columbia Trust Company, and the statements of the foregoing amended answer are true as he verily believes.

L. M. RUDER.

Subscribed and sworn to before me by L. M. Ruder, this 24th day of November, 1911. My commission expires Jan. 12th, 1914.

GEO. W. LEWIS,
Notary Public, Jefferson County, Kentucky.

On the 25th day of November, 1911, the following Demurrer was filed in Court, to-wit:

86 Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of L. P. Ewald, Deceased,
 Defendant.

Demurrer.

Comes the plaintiff, City of Louisville, and demurs to the third paragraph of the original answer of defendant filed herein for the reason that the said third paragraph of said answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to the sixth paragraph of the original answer of defendant filed herein for the reason that the said sixth paragraph of said answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph two of the defendant's amended answer herein for the reason that

said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

87 Comes the plaintiff, City of Louisville, and demurs to paragraph four of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph six of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph seven of the defendant's amended answer herein, for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph eight of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph nine of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

88 Comes the plaintiff, City of Louisville, and demurs to paragraph ten of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph eleven of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

Comes the plaintiff, City of Louisville, and demurs to paragraph twelve of the defendant's amended answer herein for the reason that said paragraph of said amended answer does not state facts sufficient to constitute a defense to the petition herein.

C. B. BLAKEY,

Attorney for City of Louisville.

At a Court held on the 27th day of April, 1912.

The Court being advised, delivered a written opinion which is filed among the papers of the case and made a part of the record herein.

It is further ordered by the Court that the demurrer of plaintiff to several paragraphs of the answer and amended answer (except the 8th paragraph of amended answer) be and it is hereby overruled, to which plaintiff by counsel excepts.

89 It is further ordered by the Court that the plaintiff's demurrer to the 8th paragraph of amended answer be and it is sustained to which defendant by counsel excepts.

Said Opinion of the Court filed on the 27th day of April, 1912, is as follows, to-wit:

Jefferson Circuit Court, Chancery, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST Co., Adm'r, Etc., Defendant.

Opinion.

While it is proper to indulge every presumption in favor of the validity of an assessment for taxes, nevertheless, when the matter is made the subject of judicial inquiry, as in an action to enforce payment of the tax bill, the Court, for the protection of the citizens from tyranny and oppression, will investigate the fact and determine whether the assessment is valid. Therefore the presumptions in favor of the validity of an authenticated tax bill goes no further than to establish the prima facie case and does not cut off any defenses allowed the citizen under the constitution.

The tax bills in question are not based on the original assessment but upon supplemental assessment made several years thereafter.

90 The face of the bills do not show specifically the property assessed. The property is described only as "personalty."

The defendant, in that part of the answer which is objected to, admits the regularity of the steps taken by the assessing officer, but in avoidance says the particular property which the officer assessed belonged to another (a corporation) and that by mistake or error was assessed as belonging to him. This makes a sharp and well-defined issue if controverted by plaintiff and is a valid defense if not controverted.

2. Where property has been assessed as omitted property by a proceeding in Court as provided by the Statute such assessment will be deemed final and conclusive for such years as may be involved. So, too, an assessment by a ministerial officer will be final as to values as in the Louisville Bridge Co. case. When however, the assessment is of omitted property by a ministerial officer it will not be deemed final except as to the value of the property assessed. In other words, when the assessing officer discovers property which has escaped assessment, he may, indeed, it is his duty, to assess irretrospectively. This is undoubtedly true of real property and there is no reason why it should not be true of personalty. If the assessor should discover that A had in his possession \$10,000.00 of railroad bond-which he had neglected to list for assessment, and the assessor should assess them retrospectively, and later the taxing authority learned that A owned \$20,000.00 of other securities which were liable to taxation but which he had also neglected to return for assessment, can any reasonable person dare contend that the assessor's powers

91 had been exhausted by the previous assessment? There is and should be a distinction between a proceeding in Court to assess omitted personalty and a proceeding by a ministerial officer to assess such property. The activity of the ministerial officer in the collection of taxes due the government is to be encouraged, but litigation between the parties beyond a day in Court is not to be encouraged, besides the power of the ministerial officer is limited while the processes of the Court are plenary.

3. The shareholder in a corporation which is liable for taxes in this Commonwealth need not pay taxes upon his shares so long as the corporation pays its taxes as required by Statute. The corporation is primarily liable. In assessing a shareholder it must first appear that the corporation has not paid its taxes. If then it be made to appear that the corporation paid its taxes as a matter of law and of right, the shareholder is not liable, and this is true whether the corporation pays its taxes voluntarily or is made to do so by suit. If then at the suit of a revenue agent and the corporation was made to pay its taxes in the county in which it is domiciled the payment enuau-ed to the benefit of the shareholder whether he holds one share of stock or all the shares of stock.

The demurrer of plaintiff to the several paragraphs of the answer and amended answer (except 8th paragraph of amended answer) overruled.

92 The demurrer to 8th paragraph of amended answer is sustained. KIRBY, J.

27th Apr. 1912.

On the 25th day of January, 1913, the following Reply was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST CO., Ex'r, L. P. Ewald, Deceased, Defendant

Reply.

The plaintiff, City of Louisville, for reply to so much of the answer and amended answer of the defendant as it is advised requires a reply, comes and says:

Paragraph One. For reply to the third paragraph of the original answer, the plaintiff denies that he Ewald Iron Company had its principal office in Lyon County, Kentucky, admits that it was claimed at said hearing that said Ewald Iron Company had on the first day of September, 1903, and on the first day of September, 1904, the sum of One Million Dollars in cash, but denies that it was that One Million Dollars of personal property that had been retrospect-

93 ively assessed for 1904 and 1905. Denies it was not pretended or claimed by the City Assessor, or the City Attorney, that said L. P. Ewald had any other property subject to retrospective assessment for either of said years, excepting money held and owned by the Ewald Iron Company; denies that it was claimed by plaintiff that said money was subject to assessment and taxation against said Ewald individually because he was the only stockholder of the Ewald Iron Company. Denies that there was no controversy of fact in the hearing before said Board of Equalization concerning said retrospective assessments; denies that it was conceded, or it was true that the property sought to be retrospectively assessed as against said Ewald, was money, held and possessed by the said Ewald Iron Company; denies that the only contention was one of law as to whether the fact that said Ewald was the sole stockholder of said company on the first days of September 1903 and 1904, subjected the personal property of said company to assessment and taxation against said Ewald; denies that the Board of Equalization assumed to, or did decide as a matter of law that said Ewald, because of his being the sole stockholder in the said Ewald Iron Company, was the owner of all of its personal property, or that the same for that reason was subject to said retrospective assessments as against said Ewald. Denies that said Board of Equalization made a mistake of law, or that through any mistake of law or other mistake on the part of said

Board said Board sustained said retrospective assessments.

94 Plaintiff denies that the City Assessor of the City of Louisville did not omit assessment of any personal property of L. P. Ewald that was subject to assessment and taxation by the City of Louisville for the years 1904 and 1905; denies that the said retrospective assessments made by said City Assessor for said years, which were sustained by the Board of Equalization, were unjust or known to be so by said City Assessor, or Board of Equalization, or were made arbitrarily or in ignorance of law, or under a mistake of law in making or sustaining said assessments as against the estate of L. P. Ewald for the sole reason that he was the only stockholder in the Ewald Iron Company; denies that the personal property, which was intended to be and was so assessed for the years 1904 and 1905, was owned and held by the Ewald Iron Company.

Paragraph Two. For reply to the sixth paragraph of the defendant's original answer, the plaintiff denies that *the* for years 1904 and 1905, the City of Louisville regularly assessed all the taxable personal property of the Ewald Iron Company; denies that the retrospective assessments made against the defendant for the years 1904 or 1905, were in fact retrospective assessments of property owned or held by the Ewald Iron Company or was subject to taxation in the name of or against said Ewald Iron Company; denies that the personal property meant to be assessed by said retrospective assessments against the defendant for 1904 or 1905 was subject to taxation

95 in the name of or against said Ewald Iron Company; denies that the City of Louisville by the retrospective assessments, sued on herein, has again retrospectively assessed the property of the Ewald Iron Company for the years 1904 or 1905; denies

that the retrospective assessments for the years 1904 or 1905 against the defendant were in fact, or at all, an attempt to re-assess retrospective property which had already been retrospectively assessed for the years 1905 or 1907 in the year 1907; denies that said retrospective assessments for the years 1904 or 1905 were an attempt to impose double taxation by the same taxing power, or did impose double taxation by the same taxing power.

Plaintiff denies that the retrospective assessments made against the Ewald Iron Company for the years 1904 or 1905 are a bar to the claim of this plaintiff based on the retrospective assessments made against the defendant herein for either of said years or of the tax bills made thereunder.

Taxes for 1906.

Paragraph Three. For reply to the second paragraph of the defendant's amended answer, the plaintiff denies that when notice was served upon the defendant at the time and place, and as mentioned in said second paragraph of his amended answer, said defendant objected to said assessment on the same grounds set out in paragraph three of defendant's original answer herein, and the plaintiff adopts as part of this paragraph of his reply paragraph one of this reply as fully as written herein.

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Plaintiff denies that the principal place of business of the Ewald Iron Company on the first of September, 1905 was in Lyon County, Kentucky; plaintiff denies that the defendant shows in paragraph number twelve of its amended answer herein that said retrospective assessment was not made on the theory on which the plaintiff's amended petition is based; plaintiff denies that said retrospective assessment is invalid; denies that the said Ewald Iron Company made a proper return of its taxable property assessable at its home office to the Assessor of Lyon County, Kentucky; denies that its home office was at Lyon County, Kentucky.

Plaintiff denies that the Ewald Iron Company also regularly listed with the City Assessor, of the City of Louisville, all property owned by it in Jefferson County, Kentucky, as of the first of September, 1905.

Plaintiff denies that said original assessments or said suit against the Ewald Iron Company, or both, are a bar of any further assessment against the stockholders of the Ewald Iron Company on account of stock owned by them in the Ewald Iron Company; denies that by reason of said assessments against the Ewald Iron Company, or said suit or both, the taxing power of the Commonwealth of Kentucky or any subdivision thereof has exhausted its right to further taxation against the stock of any holder, of the capital stock of that company.

97

Taxes for 1907.

Paragraph Four. For reply to the fourth paragraph of defendant's amended answer, the plaintiff denies that when notice was served upon the defendant at the time and place, and as mentioned

in paragraph four of his amended answer, said defendant objected to said assessment on the same grounds set out in paragraph three of the defendant's original answer herein, and the plaintiff adopts as part of this paragraph of his reply paragraph one of this reply as fully as if written herein.

Plaintiff denies that the principal place of business of the Ewald Iron Company on the first of September, 1906, was in Lyon County, Kentucky; denies that the defendant shows in paragraph number twelve of its amended answer herein that said retrospective assessment was not made on the theory on which the plaintiff's amended petition is based; denies that said retrospective assessment is invalid; denies that the Ewald Iron Company made a proper return of its taxable property assessable at its home office to the Assessor of Lyon County, Kentucky; denies that its home office was at Lyon County, Kentucky.

Plaintiff denies that the Ewald Iron Company also regularly listed with the City Assessor, of the City of Louisville, all property owned by it in Jefferson County, Kentucky, as of the first day of September, 1906.

98 Plaintiff denies that said original assessments or said suit against the Ewald Iron Company or both are a bar to any further assessment against the stock holders of the Ewald Iron Company on account of stock owned by them in the Ewald Iron Company; denies that by reason of said assessment against the Ewald Iron Company in said suit the taxing power of the Commonwealth of Kentucky, or of any subdivision thereof, has exhausted its right to further taxation against the stock of any holder of the capital stock in that company.

Taxes for 1908.

Paragraph Five. For reply to the sixth paragraph of defendant's amended answer, the plaintiff denies that when notice was served upon the defendant at the time and place, and as mentioned in paragraph six of his amended answer, said defendant objected to said assessment on the same grounds set out in paragraph three of the defendant's original answer herein, and the plaintiff adopts as part of this paragraph his reply paragraph one of this reply as if written herein.

Plaintiff denies that the principal place of business of the Ewald Iron Company on the first of September, 1907, was in Lyon County, Kentucky; denies that the defendant shows in paragraph number twelve of its amended answer herein that said retrospective assessment was not made on the theory on which the plaintiff's amended petition is based; denies that said retrospective assessment is
99 invalid; denies that the Ewald Iron Company made a proper return of its taxable property assessable at its home office to the Assessor of Lyon County, Kentucky; denies that its home office was at Lyon County, Ky.

Plaintiff denies that the Ewald Iron Company also regularly listed with the City Assessor, of the City of Louisville, all property

owned by it in Jefferson County, Kentucky, as of the first of September, 1907.

Plaintiff denies that said original assessments or said suit against the Ewald Iron Company or both are a bar to any further assessment against the stockholders of the Ewald Iron Company on account of stock owned by them in the Ewald Iron Company; denies that by reason of said assessment against the Ewald Iron Company in said suit the taxing power of the Commonwealth of Kentucky, or of any subdivision thereof has exhausted its right to further taxation against the stock of any holder of the capital stock in that company.

Taxes for 1904.

Paragraph Six. For reply to paragraph seven of the defendant's amended answer, plaintiff denies that at all times, thereafter mentioned, particularly on September first, 1903, or as of that date the Ewald Iron Company, had its principal place of business in Lyon County, Kentucky; denies that it made a proper return of its taxable property assessable at its home office to the
100 Assessor of Lyon County, Kentucky.

Plaintiff denies that the original assessment of the Ewald Iron Company in Lyon County, or the judgment entered in the suit referred to by defendant, against the Ewald Iron Company, or both, are a bar to any further proceedings on behalf of the Commonwealth of Kentucky, or any subdivision of its taxing power on account of taxes on the capital stock of said corporation owned by any stockholder thereof.

Taxes for 1905.

Paragraph Seven. For reply to paragraph nine of the defendant's amended answer, the plaintiff denies that at all times, thereafter mentioned, particularly on September first, 1904, and as of that date the Ewald Iron Company had its principal place of business in Lyon County, Kentucky; denies that it made a proper return of its taxable property assessable at its home office to the Assessor at Lyon County, Kentucky.

Plaintiff denies that the original assessment of the Ewald Iron Company in Lyon County, Kentucky, or the judgment entered in the suit, or both, referred to by defendant, against the Ewald Iron Company are a bar to any further proceedings on behalf of the Commonwealth of Kentucky or any subdivision, of its taxing power on account of taxes on the capital stock of said corporation owned
by any stockholders thereof.

101 Paragraph Eight. For reply to paragraph ten of defendant's amended answer, plaintiff denies that the defendant decedent, L. P. Ewald, regularly listed with the Assessor all of his taxable property as of the first of September, 1904; denies that thereafter the Assessor of the City of Louisville in or about April, 1907, or at any other time until the assessment complained of in this action

was made, acting under the authority conferred upon him by Section 2991 of the Kentucky Statutes, or at all, retrospectively assessed property of the defendant's decedent, L. P. Ewald, or that any property retrospectively assessed at said time was claimed to be property which L. P. Ewald had omitted from taxation as of the first day of September, 1904; denies that thereafter, or at all, a new tax bill, based on said alleged retrospective assessment, was made against said L. P. Ewald, or paid by him, until the bill complained of herein was made out.

Paragraph Nine. For reply to paragraph eleven of the defendant's amended answer, the plaintiff denies that for each of every year that the plaintiff has retrospectively assessed L. P. Ewald's estate, as set out in the petition herein, the Ewald Iron Company was duly assessed for taxation by the City of Louisville on all its tangible property located in the City of Louisville, Kentucky.

102 Plaintiff denies that the Ewald Iron Company had a branch of its business, or maintained an office, or an extensive, or any plant in St. Louis, Missouri, during the times mentioned in the plaintiff's petition and amended petition; denies that the money, referred to in said paragraph eleven of the defendant's answer, represented the surplus accumulations of said company which were not in any manner connected with, or treated, or considered as any part of the assets of the business of said company conducted in Louisville, Kentucky; denies that said money was not used to finance said business; denies that said money was carried on said company's books as a part of the assets of said St. Louis branch.

The plaintiff denies that if said money was subject to taxation in Kentucky at all it was only taxable in Lyon County, Kentucky; denies that said Company's principal office was in Lyon County, Kentucky; denies that it was the duty of said L. P. Ewald to list said shares of stock in Lyon County rather than in Jefferson County, Kentucky, for taxation.

Plaintiff denies that any assessment of said shares of stock by the City of Louisville was or is void.

103 Plaintiff denies that at the time each or any of said retrospective assessments were made the said Ewald Iron Company still existed for the purpose of liquidation or at all, or still owned ample or any property out of which the taxes claimed herein could have been satisfied if said company had owned them.

Paragraph Ten. For reply to paragraph twelve to the defendant's amended answer, the plaintiff denies that defendant did not have an opportunity to show that the assessments sued on herein were unauthorized; denies that there was no purpose on the part of the Assessor to make said retrospective assessments on shares of stock in the Ewald Iron Company owned by the said L. P. Ewald; plaintiff denies that the claim made in the amended petition, that said assessments were so intended, was or is an afterthought, or a pretense on the part of the plaintiff to avoid the effect of the decision of the Court of Appeals rendered after said assessments were made.

Paragraph Eleven. For further reply to the answer and the amended answer of the defendant, the plaintiff says that all times men-

tioned in the plaintiff's petition and amended petition and until November 5, 1907, the principal place of business of the Ewald Iron Company was the City of Louisville, Jefferson County, Kentucky, and said City of Louisville was the situs for the purpose of

104 taxation of all the tangible property of said company, including all stocks, bonds, money and choses in action which said company had in the City of St. Louis, State of Missouri, or elsewhere; says that said Ewald Iron Company did not pay taxes on all its property of every kind for the years 1904, 1905, 1906, 1907 or 1908, or any of said years either to the County of Lyon, the State of Kentucky, or the City of Louisville.

Plaintiff says that defendant's decedent, L. P. Ewald, was at all times mentioned herein the sole stockholder of said Ewald Iron Company, was in absolute control thereof and all the acts of said corporation were directed by said decedent; says that the failure of said Ewald Iron Company to pay taxes on all its property of every kind, as aforesaid, was due to acts of said L. P. Ewald, deceased, in causing said corporation to fail to list all its property of every kind for taxation for said years, and in causing said corporation to secrete from the proper assessing officer or officers the greater portion of its property.

GEO. CARY TABB,
LEON P. LEWIS,

Attorneys for Plaintiff.

1/24/13.

Notice of filing waived.

GIBSON & CRAWFORD.

Att'ys for Def't.

105 On the 27th day of February, 1913, the following Amended Answer was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Amended Answer.

The Columbia Trust Company, as Executor and Trustee under the will of L. P. Ewald, deceased, by leave of Court amends its answer herein, and particularly amends paragraph 11 of said answer, so that when amended, it shall read as follows:

Defendant says that for each and every year that the plaintiff has retrospectively assessed L. P. Ewald's estate, as set out in the petition, to-wit: for the years 1904, 1905, 1906, 1907, and 1908, the

Ewald Iron Company was duly assessed for taxation by the City of Louisville and State of Kentucky on all of its tangible property located in the City of Louisville, Kentucky, and that said taxes were paid by the Ewald Iron Company; and that during each and every year that the plaintiff has retrospectively assessed L. P. Ewald's estate, as set out in the petition, to-wit: for 1904, 1905, 1906, 1907, and 1908, the City of Louisville and State of Kentucky duly
106 assessed for taxation all of the property of L. P. Ewald which was held or owned by said L. P. Ewald except stock owned by him in the Ewald Iron Company.

Defendant says that the only property claimed by the City of Louisville to have been omitted from assessment either by the Ewald Iron Company or L. P. Ewald, was the following sums of money deposited in banks in St. Louis, Missouri, on said dates to the credit of the Ewald Iron Company:

On the 1st day of September, 1903, \$1,000,000; on the 1st day of September, 1904, \$1,000,000; on the 1st day of September, 1905, \$1,250,000; on the 1st day of September, 1906, \$1,550,000; on the 1st day of September, 1907, \$1,850,000, and that the retrospective assessments for the years 1904, 1905, 1906, 1907 and 1908 respectively cover solely a liability claimed against L. P. Ewald on account of his ownership of stock in the Ewald Iron Company growing out of the omission of said Ewald Iron Company to list with the City Assessor of the City of Louisville for taxation the above respective sums for the different years.

Defendant says that under section 4088 of the Kentucky Statutes, it is provided by the General Assembly of the State of Kentucky as follows:

107 "The individual stockholders of a corporation who are by this article required to report and pay taxes on the corporate franchise, shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises herein provided."

Defendant says that during each of the years for which L. P. Ewald, was retrospectively assessed, the Ewald Iron Company paid the taxes on all of its franchises and corporate property located in the State of Kentucky, and that the sums of money not listed by it for taxation, which formed the basis of said retrospective assessments, were sums of money belonging to the Ewald Iron Company deposited in banks in St. Louis, Missouri, to the credit of the St. Louis branch of the Ewald Iron Company, where said company maintained an office and extensive plant, and kept books, made contracts, and received and retained money to the credit of the St. Louis Branch as distinguished from the Kentucky Branch of said corporation.

Defendant states that said money represented surplus accumulations of said company, which were not in any manner connected with, or treated or considered as any part of the assets of the business of said company conducted in Louisville, Kentucky, and were not in any manner used to finance said business in Louisville, Kentucky, or in any way necessary or connected with the Louisville business, but were carried on the company's books at its
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St. Louis branch, and not elsewhere, as part of the assets of said St. Louis branch.

Defendant says that under the settled law of the State of Kentucky, money belonging to corporations organized under the laws of the Commonwealth of Kentucky, and doing business out of Kentucky, but arising out of business done elsewhere in the respective states, is not liable to taxation in Kentucky, and that money deposited in banks in Kentucky, belonging to foreign corporations doing business in Kentucky, is liable to taxation in Kentucky, and that to tax the shares of the estate of this defendant's decedent in the Ewald Iron Company, when said Ewald Iron Company had paid on all its property located in the State of Kentucky, would be to take the property of the estate of defendant's decedent without due process of law, and without affording the estate of defendant's decedent equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant pleads and relies said Amendment to the Constitution of the United States against the claims set up in the petition herein.

Wherefore, defendant prays as in its original answer.

GIBSON & CRAWFORD,

Attorneys for Defendant.

Feb. 26, 1913.

Notice of filing waived.

GEO. CARY TABB,

Of Counsel for Pl'tf.

109 On the 27th day of February, 1913, the following Rejoinder was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Rejoinder.

The defendant, Columbia Trust Company, as executor and trustee under the will of L. P. Ewald, for rejoinder to paragraph 11 of the reply of the City of Louisville, says it is not true that at all or any time mentioned in the plaintiff's petition or amended petition, or until November 5, 1907, the principal place of business of the Ewald Iron Company was the City of Louisville, Jefferson County, Kentucky, or that said City of Louisville was the situs for the purpose of taxation of all or any of the intangible property of said company, or including all or any stocks or bonds, or money, or choses in action which said company had in the city of St. Louis, State of Missouri,

or elsewhere, or that said Ewald Iron Company did not pay taxes on all its property of every kind for the years 1904, 1906, 1907 or 1908, or any of said years either to the County of Lyon or the State of Kentucky, or the City of Louisville.

110 It is not true that the defendant's decedent, L. P. Ewald, was at all times mentioned in plaintiff's petition or amended petition or reply the sole stockholder of said Ewald Iron Company, or was in absolute control thereof, or that all the acts of said corporation were directed by said decedent, or that the failure of said Ewald Iron Company to pay taxes on all or any of its property of every kind was due to the acts of said L. P. Ewald deceased, in causing said corporation to fail to list all or any of its property of every kind for taxation for said years, or in causing said corporation to secret from the proper assessing officers or officer the greater portion of its property.

Wherefore, etc.

GIBSON & CRAWFORD,
Attorneys for Defendant.

Feb. 26, 1913.

Notice of filing waived.

GEO. CARY TABB,
Of Counsel for Plaintiff.

On the 19th day of March, 1913, the following Reply to Second Amended Answer was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Reply to Second Amended Answer.

111 The plaintiff, City of Louisville, for reply to the second amended answer of the defendant filed herein, denies that during each and every or any year that the plaintiff has retrospectively assessed L. P. Ewald's Estate as set out in the petition, to-wit: For the years 1904, 1905, 1906, 1907 and 1908 the City of Louisville, or the State of Kentucky duly assessed for taxation all of the property of L. P. Ewald which was held or owned by said L. P. Ewald, except stock owned by him in the Ewald Iron Company.

Plaintiff denies that the only property claimed by the City of Louisville to have been omitted from assessment, either by the Ewald

Iron Company or L. P. Ewald, were the following sums of money in banks in St. Louis, Missouri, on said dates to the credit of the Ewald Iron Company, to-wit: First day of September, 1903, \$1,000,000; first day of September, 1904, \$1,000,000; first day of September, 1905, \$1,250,000; first day of September, 1906, \$1,550,000; first day of September, 1907, \$1,850,000. Denies that the retrospective assessments for the years 1904, 1905, 1906, 1907, 1908 cover solely a liability claimed against L. P. Ewald on account of his ownership of stock in the Ewald Iron Company growing out of the omission of the said Ewald Iron Company to list with the City Assessor of the City of Louisville for taxation the above respective sums for the different years.

112 Plaintiff denies that during each of any of the years for which L. P. Ewald was retrospectively assessed, the Ewald Iron Company paid the taxes on all of its franchise and corporate property located in the State of Kentucky; denies that the sums of money not listed by it for taxation, which are alleged by defendant to form the basis of said retrospective assessments, were sums of money to the credit of the St. Louis branch of the Ewald Iron Company; denies that said Ewald Iron Company maintained an extensive plant in St. Louis; denies that said Ewald Iron Company kept all or any of its books, or made all or any of its contracts in St. Louis, or received or retained money to the credit of the St. Louis branch as distinct from the Kentucky branch of said corporation.

Plaintiff denies that said money represented surplus or accumulations of said company which were not in any manner connected with, or treated, or considered as a part of the assets of the business of said company conducted in Louisville, Kentucky. Denies that said surplus accumulations were not in any way, or any manner used to finance said business in Louisville, Kentucky, or in any way necessary, or connected with the Louisville business. Denies that said surplus accumulations were carried on the company's books at its St. Louis branch and not elsewhere or as a part of the assets of said St. Louis branch.

113 Plaintiff denies that, under the well settled law of the State of Kentucky, money belonging to corporations organized under the laws of the Commonwealth of Kentucky and doing business out of Kentucky, but arising out of business done elsewhere in the respective states, is not liable for taxation in Kentucky; denies that the said Ewald Iron Company has paid taxes on all of its property located in the State of Kentucky; denies that to tax the shares of the estate of this defendant's decedent in the Ewald Iron Company would be to take property of the estate of the defendant's decedent without due process of law, and without affording the estate — the defendant's decedent equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States. Plaintiff says that the defendant's plea of said amendment of the Constitution of the United States is not applicable to this case and should not bar plaintiff's recovery.

Wherefore, having fully replied, plaintiff prays as in its original

petition and amended petition, and prays for all proper and equitable relief.

Respectfully submitted,

GEO. CARY TABB,
STEWART CHEVALIER,
Attorneys for Plaintiff.

Notice of filing waived.

GIBSON & CRAWFORD,
Att'ys for Def'ts.

114 On the 26th day of April, 1913, the following Depositions of Walter B. Donnell, Wm. Burg, J. M. Buick, George P. Herrman, Harry Beer, James P. Sweeney, and 2 Exhibits were received by mail and filed in the Clerk's Office, to-wit:

COMMONWEALTH OF KENTUCKY:

Jefferson Circuit Court, Chancery Branch, Second Division.

No. 61955.

CITY OF LOUISVILLE, Complaint,

vs.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

The depositions of Walter B. Donnell, Wm. Burg, J. M. Buick, George P. Herrman, Harry Beer, James P. Sweeney, taken pursuant to agreement, before me, on the 16th day of April, 1913, at the office of Manton Davis, 1307 Wright Building, northwest corner of Eighth and Pine Streets, St. Louis, State of Missouri, to be read in evidence in behalf of the complain-t at the trial of said cause.

Appearances:

George Cary Tabb, for the complainant.
W. W. Crawford, for the defendant.

(Said depositions taken under agreement.)

115 WALTER BARTLETT DONNELL, called in behalf of the complainant, being duly sworn and examined by Mr. Tabb, testified as follows:

Q. Please state your full name?

A. Walter Bartlett Donnell.

Q. Age?

A. Twenty-five,

Q. Occupation?

A. Deputy Assessor.

Q. In what office?

A. In the office of the assessment of the revenue of the City of St. Louis.

Q. I will ask you what assessments are taken care of by that office? I mean by that, state, county or city assessments?

A. Do you mean for what purpose the taxes are collected?

Q. To what they are applied?

A. We take what are called general taxes, that is, for the state, city and school tax.

Q. Is there any other assessor's office that has anything to do with the state or county assessments than your office?

A. No, no general taxes at all.

Q. In this jurisdiction?

A. No other general taxes at all.

Q. Mr. Donnell, I will ask you whether you have examined the records of your office with reference to taxes listed in the name of L. Phillip Ewald, Louis Phillip Ewald, and the Ewald Iron Company as of June the first, 1903, '04, '05, '06, and '07, respectively?

A. Yes, sir.

Q. I will ask you as of what date property is given in for assessment?

A. On the first day of June each year for the taxes of the ensuing year.

116 Q. I will ask you then as of what date taxes for the year 1904 would be given in?

A. June first, 1903.

Q. I will ask you if you made out a list from your records of the taxes given in your office in the name of L. Phillip Ewald, Louis Phillip Ewald, and the Ewald Iron Company as of June the first, 1903, '04, '05, '06, and '07?

A. Yes, sir.

Q. I will ask you if you have such a list with you?

A. This is it right here (producing paper).

Q. I will ask you to file that list as a part of your deposition marked Exhibit A.

Mr. Crawford: Objected to.

A. I do so.

(Said paper above referred to marked Exhibit A, and the same is attached to and made a part of this deposition.)

Mr. Tabb: I will ask you if that is a correct list, a correct copy of the records of your office of the property listed by L. Phillip Ewald, Louis Phillip Ewald, and the Ewald Iron Company as of the dates referred to?

Mr. Crawford: Objected to.

A. That is not entirely listed by them. The real estate is assessed

by the district assessors. They do not list real estate; that is taken care of from the records of the recorder's office. The personal property in two instances was assessed also by the district assessor.

117 Q. In what instances were they?

A. In the year 1904 it was assessed by the district assessor, and also in the year 1905.

Q. How is that indicated, if at all, on your list?

Mr. Crawford: Objected to.

A. In this list here (indicating)?

A. Yes.

A. I have made that statement—"Personal property assessed by d. A." which stands for district assessor.

Q. Now, with those two exceptions with reference to personal property, I will ask you if the list shows the property listed?

A. In only one instance did the Ewald Iron Company make a return.

Mr. Crawford: Objected to.

Mr. Tabb: In what instance was that?

A. For the taxes for the year 1906, they returned by sworn return.

Q. With reference to the other years, how were they?

A. They were assessed by the district assessor.

Mr. Crawford: The defendant waives the production of the original records, but objects to all questions concerning the assessments made in St. Louis, because same are irrelevant and immaterial upon the hearing of this issue; and objects to all questions concerning the method and manner of making said assessments.

Mr. Tabb: Now, Mr. Donnell, I will ask you how you have indicated, if at all, on the list made out by you, when the return was made by Mr. Ewald or the Ewald Iron Company, as distinguished from being assessed by the assessor.

118 A. I made the statement under the year of 1906, giving the book the bill number and with the statement "Returned to Assessor," showing there was a return made and not an assessment arbitrarily assessed by the district man.

Q. Now, in what office are returns of cash, of money on hand or money on deposit in bank or other safe place, made by corporations in St. Louis?

A. They are made in the assessor's office.

Q. That is the office in which you work?

A. In which I am employed yes sir.

Q. I will ask you how long you have been employed in that office?

A. Two years and ten months about, not quite three years.

Q. Have you in your possession a form upon which return is made, tax returns to your office?

A. I have a blank tax return here for 1913 taxes (producing paper).

Q. Now, I will ask you to file that form as a part of your deposition marked Exhibit B.

Mr. Crawford: Objected to.

A. All right. I will do that.

(Said paper above referred to marked Exhibit B, and the same is attached to this deposition and made a part thereof.)

Mr. Tabb: Referring again to your Exhibit A I wish you would explain as simply as you can, what the different columns which you have here mean, taking each up and going across from the left of the page to the right.

A. Well, I have them headed here as to what they are.

Q. Take 1904 for instance.

A. The first column refers to the city block in which the property is situated.

119 Q. Is that real estate?

A. That is the real estate yes. For personal property I haven't got it in regular columns at all, just one assessment. And the second column refers to the street on which the property fronts; the third column is the front feet, number of front feet; and the fourth column is the assessed valuation on the piece of property in dollars; the next column is the amount of taxes which will go to the state.

Q. In dollars?

A. In dollars.

Q. What is that amount?

A. \$89.573. And the next column is the amount of taxes in dollars that goes to the school.

Q. Read that amount?

A. \$289.795. And the next column is the amount that will go to the state.

Q. Read that amount?

A. \$774.543. And the last column is the total amount of taxes, \$1,153.911.

Q. Have you used that same system all the way through with reference to real estate?

A. Yes, sir.

Q. Now with reference to personal property, take 1904 against L. Philip Ewald.

A. There is no personal property in that name. The only personal property is in the name of the Ewald Iron Company.

Q. What is that?

A. I started out "Personal property assessed by the district assessor," and in the fourth column I put "\$500"; that is the total amount of the assessment; and in the next column I put the amount of taxes.

120 Q. Which is how much?

A. Which is 85 cents owing to the state; in the next column \$2.75 owing to the school; in the next column \$7.35 owing to the city, and in the last column \$10.95, which is the total taxes on that assessment.

Q. Do your records show any assessment of personal property given in by Philip Ewald or Louis Phillip Ewald during the years mentioned?

A. As far as our books show there is no personal property either in the name of L. Phillip or Louis Phillip Ewald.

Q. Now, I will ask you what your books show as to the personal property given in by the Ewald Iron Company for the years mentioned?

A. You want me to give the amounts?

A. Yes.

Mr. Crawford: I object to that, as the statement is already in evidence.

Mr. Tabb: And also as to whether it was listed or assessed by the district assessor?

A. For the taxes of 1904, there was an assessment made by the district assessor of \$500. In 1905, the same amount \$500, assessed by the district assessor. In 1906, there was a return made to the assessor by the Ewald Iron Company of \$450. In 1907 and 1908, there was no assessment for personal property by the Ewald Iron Company either returned or assessed.

Q. If the Ewald Iron Company had money on deposit in bank, or other safe place, which was taxable in St. Louis, was it the duty of that company to make a return to your office for the years 1904, '04, '06, '07 and '08?

Mr. Crawford: Objected to.

A. The law requires it yes.

121 Mr. Tabb: That is all.

Cross-examination by Mr. Crawford:

Q. Mr. Donnell there is a license tax collected in St. Louis on business done is there not?

A. Yes, sir.

Q. You have not included in that the license tax paid by the Ewald Iron Company, have you?

A. No, sir.

Q. Do you know that, as a matter of fact, the Ewald Iron Company paid a license tax in St. Louis on the entire amount of business done by that company, which business aggregated several hundred thousands of dollars per year?

A. I don't know from my own knowledge; I know that the law requires that.

Q. You do not know that that was not done, do you?

A. I know nothing about that office. That is, as to the details of it.

Q. Doesn't that license tax exclude certain other taxes against the property?

A. It does not exclude making a personal return, no, sir.

Q. However, that tax is all paid in a separate office?

A. That is paid in a separate office. There is—If you wish me to explain, I will go ahead and explain it.

Mr. Crawford: No, I don't care for that now. That is all.

Redirect examination by Mr. Tabb:

Q. I wish you would explain that.

A. There is an agreement between the license collector and the assessor whereby certain things are taken in our office and not taken in the license collector's office. For instance, money on hand or in bank, office fixtures, horses and wagons, or automobiles, or any delivery things of that kind, are returned to our office, but we
122 do not take taxes on machinery that is used in the business, nor the amount of sales, all of which is taken in the license collector's office. There is no double taxation, and there is no chance of missing anything.

Q. What is it the duty of the license office to take with reference to corporations?

A. The machinery or apparatus that is used in their business, in actual use, and the amount of sales.

Mr. Tabb: That is all.

Recross-examination by Mr. Crawford:

Q. Only incidental matters relating to the actual use of the business is taken in the other office, is it?

A. I don't quite understand your question.

Q. You say that machinery and the apparatus used in the operation of the business, the taxes on that is paid in the other office, not in your office?

A. A license is collected on it, the stock of goods and machinery that is actually used.

Q. The tax paid on that is a license tax?

A. License tax, yes, sir.

Q. That is not taken in your office?

A. No, sir, that is not called a general tax.

Q. You don't mean to testify that the Ewald Iron Company never paid their full taxes on that?

A. I know nothing about what they did in the license collector's office.

Mr. Crawford: That is all.

(Signature of witness waived.)

• 123 WILLIAM BURG, called on behalf of the complainant, being duly sworn and examined by Mr. Tabb, testified as follows:

Q. Mr. Burg, please give your full name and business address?

A. William Burg, 119 North 3d Street, St. Louis.

Q. What is the name of your firm?

A. I am a broker in iron and steel.

Q. What is the name of the concern?

A. That is the name of the concern—William Burg.

Q. Where is your office?

A. 119 North Third Street.

Q. Mr. Burg, were you ever connected with the Ewald Iron Company?

A. Yes, sir.

Q. State, in a general way now, just what your connection was, when it started, and when it ended?

A. Now, you know—I want to say before I state this, that it is so long ago that my memory may fail me; I will do the best I can; it is nearly 20 years ago since I left there, and some of these incidents are older than that. Now, when I first I—was with the Ewald Iron Company when it was first organized and incorporated, I think in Louisville, Kentucky. We formerly were located—the mill was located at Tennessee Rolling Works, on the Cumberland River; that is in Lyon County.

Q. Kentucky?

A. Kentucky, yes, sir. Now, I cannot recall the date when the company was incorporated; that is too long for me, but it must have been sometime—I believe the date was given in the deposition I made here sometime ago.

124 Q. That is not at all important if you don't happen to remember it.

A. Sometime around, I should say, about '80 I think, or '81.

Q. How long were you with them?

A. I was with them then, and was elected the first secretary.

Q. How many shares of stock did you hold in the company?

A. Well, at that time I held none, when I first started in, but in later years before I left the Ewald Iron Company, I acquired 250 shares; that is my recollection; I think that was the number 250. And that is what I owned when I left the company.

Q. What did you get for your 250 shares when you left?

A. It was something like \$41,000; I do not remember the exact figures.

Q. Whom did you turn that over to?

A. To Mr. Ewald, and his lawyer, Colonel Finkelnberg.

Q. Do you know about when that was that you left?

A. Now, I think it was about 1893 or '94; Now, I don't know which.

Q. Was Mr. Damon with the company then?

A. Yes, sir.

Q. When you left?

A. Yes, sir; he was a stockholder.

Q. When you left was he a stockholder?

A. Oh, no, not when I left; hold on; I didn't understand you. I am giving you at the time I was leaving there. Mr. Damon had left some years before that.

Q. Do you know about when he left?

A. Well now, I would say about 1888, or '89 thereabouts.

Q. Was he one of the original incorporators?

A. Yes, sir, he was one of the original incorporators, with Mr. L. P. Ewald.

125 Who else owned stock in the concern during your connection with it other than Mr. Ewald, Mr. Damon and yourself?

Mr. Crawford: Objected to.

A. Dr. Schaefer, Thomas Schaefer.

Mr. Tabb: Do you know how many shares he had?

A. I think he had five shares or ten shares, something like that, five or ten shares, just a nominal amount.

Q. Was he with the company when you left, and did he own that stock at that time?

A. I believe he was, but I would not be sure of that.

Q. Do you know what Mr. Damon got for his interest, for his stock?

Mr. Crawford: Objected to.

A. If I remember right, he was only a stockholder, you understand; he never was an officer.

Mr. Tabb: I understand.

A. He was a stockholder and incorporator, and I think he got something like \$100,000 for his shares.

Q. I will ask you who was the dominating person of the concern while you were connected with it?

A. Mr. L. P. Ewald.

Q. When Mr. Damon sold out his interest, was his stock reissued to anybody else?

A. No, sir; it was taken in by the company.

Q. Do you know how many shares of stock there were in the original—

A. Well, I don't remember the number of shares. It was incorporated for \$200,000.

126 Q. What was the par value of the stock.

A. \$100 a share.

Q. Have you any idea when the Ewald Iron Company moved from Lyon County to Louisville?

Mr. Crawford: Objected to.

Mr. Tabb: I will ask you whether or not they did move from Lyon County, to Louisville?

Mr. Crawford: Objected to.

A. Yes; they moved the mill from Lyon County, Kentucky, to Louisville, Ky.

Mr. Tabb: Was that before you left the company?

A. Oh yes, before I left the company.

Q. State whether or not any operations were carried on in Lyon County after that time?

A. None to my recollection after that.

Q. State where the iron which was sold by the Ewald Iron Company was made after leaving Lyon County, where it was manufactured?

A. At Louisville, that is, that part of the iron or that class of iron which we called the Tennessee Charcoal, and other brands.

Q. Was any iron manufactured anywhere else by the Ewald Iron Company—

A. No, sir.

Q. —than at Louisville?

A. No, sir.

Q. Did I understand you to say that you did not remember whether Dr. Schaefer owned an interest in the Ewald Iron Company when you left or not?

A. I am not sure about that, but I think he did. I think he still had his stock and was still at the work.

Q. Did anybody else than you and Mr. Ewald and Dr. Schaefer own any interest when you left?

A. Not to my knowledge, no.

Mr. Tabb: That is all.

127 Cross-examination by Mr. Crawford:

A. Mr. Burg, the Ewald Iron Company was in existence as a going concern in St. Louis Missouri prior to any incorporation in Kentucky, was it not?

A. Yes, sir.

Q. Had a warehouse in St. Louis?

A. Yes, sir, warehouse; and bought and sold iron.

Q. Mr. Ewald, in part, at least, lived in St. Louis, did he not? Part of the time at least he lived in St. Louis, Missouri?

A. I should say so, yes, sir.

Q. You lived in St. Louis, Missouri?

A. Yes, sir.

Q. Dr. Schaefer lived in St. Louis?

A. No, sir; Dr. Schaefer lived in Louisville.

Q. He was a nominal holder, I believe you say?

A. Yes, a small number of shares.

Q. Mr. Damon, lived in St. Louis?

A. Yes, sir.

Q. How long had Mr. Ewald been doing business in St. Louis prior to 1880?

A. For a number of years.

Q. Ten or fifteen years?

A. Probably ten or fifteen years, something like that, yes, sir.

Q. And in 1880, or prior to 1880, the Ewald Iron Company was considered a St. Louis concern, was it not?

A. Yes, if that date is correct, that is right, yes, sir assuming that date is correct, which I think it is.

Q. That is, assuming 1880 to be the date of the incorporation in Kentucky?

A. Yes, sir. I am only guessing at that, you know.

128 Q. Now prior to that time, the only operation conducted by the Ewald Iron Company in Kentucky was to operate a rolling mill in Lyon County?

A. You mean prior to 1880?

Q. Yes.

A. No, sir, there was nothing in Kentucky at all prior to that.

Q. Nothing in Kentucky prior to 1880?

A. No, sir. It was a St. Louis institution all along. And we went down there and bought out the old Tennessee Rolling Works at that time.

Q. That is what I was getting at before. Prior to the purchase of the rolling mill known as the Tennessee Rolling Mills, the Ewald Iron Company was exclusively a Missouri concern?

A. Exactly; that is right.

Q. After the purchase of the Tennessee Rolling Mills, and after the incorporation in Kentucky of the Ewald Iron Company, the principal office of the Ewald Iron Company still remained in St. Louis, did it not?

A. Yes, sir, that was my remembrance.

Q. The only reason for stating in the articles of incorporation that the principal office was in Lyon County, Kentucky, was to comply with the Kentucky Law, was it Not?

A. I would not say as to that; that probably might have been the case; I don't know.

Q. At least, no office was maintained—I mean no office where the books of the company were kept—in Kentucky?

A. The mill had an office in which they kept their books.

Q. That was merely the mill office?

A. The mill office, yes, sir.

129 Q. The solicitors for the company were all paid—

A. They did not report there.

Q. They reported to St. Louis, and were paid in St. Louis?

A. They reported to and were paid from St. Louis.

Q. All business of the company with reference to customers was carried on in St. Louis?

A. With reference to sales, yes, sir, was carried on in St. Louis.

Q. You, as secretary, had your office in St. Louis?

A. Yes, sir.

Q. And it was from that office that all salaries were paid by the company, except to the employees at the mill?

A. Yes, except the mill employees.

Q. The office in Lyon County was merely an office concerning the output of the mill, and all billing was done through the St. Louis office?

A. That is partly true only, because they did have some customers in Louisville, and billed them direct from Louisville.

Q. That was an inconsiderable part of the business, was it not?

A. It was not the largest part, no.

Q. In addition to selling the products of the Tennessee Rolling Mill, the Ewald Iron Company in St. Louis sold other products, did it not?

A. Yes, sir, we sold other iron.

Q. Iron that never got into Kentucky at any time?

A. Iron we bought from Pittsburg and elsewhere.

Q. You maintained here a warehouse in which you kept stuff of that kind?

A. Yes, sir.

Q. And sold it out from there?

A. Yes, sir.

130 Q. Your salesmen solicited orders for that as well as for the iron made in Kentucky?

A. Sure.

Q. Now, you spoke of the removal of the Tennessee Rolling Mill; that was not accurate, was it?

A. You mean, from Lyon County?

A. From Lyon County?

A. Sure it was.

Q. Isn't it a fact that you simply bought another plant in Louisville, Kentucky?

A. We bought an old plant in Louisville, Kentucky, and then removed certain machinery and such as we could use from the old Lyon County Works, which was called the Tennessee Rolling Works, to Louisville and installed it there.

Q. You did not move all the machinery at the Lyon County plant, did you?

A. We moved all that was available.

Q. For the Louisville plant?

A. Yes, sir, that was any good.

Q. You don't know when that removal took place?

A. Well, I could not from memory tell, no, sir.

Q. Your company still maintained in Lyon County, a watchman, and there was no formal removal, was there?

A. Yes, sir, there was a formal removal. I do not remember that we had any watchman.

Q. Did you change your articles of incorporation?

A. No, sir, not that I know of; Mr. Ewald may have done it without my knowledge; not to my knowledge he didn't.

Q. You don't know what was done with reference to that?

A. I don't know what was done with reference to changing the incorporation papers. I do not remember that there was any change; if there was, it was done without my knowledge. But we moved the mill from there to Louisville.

131 Q. You don't know what Mr. Ewald's intention was as to moving back to Lyon County, do you?

A. No, sir.

Q. Don't you know as a matter of fact he intended to move back to Lyon County as soon as he could get facilities for shipping there?

A. Not to my knowledge; I know nothing of it.

Q. You know nothing of it, one way or the other?

A. No, sir, never heard of such a thing.

Q. Now, in reference to the Louisville office, after the time that the Louisville Mill was purchased, St. Louis continued to be the main office of the company, did it not?

A. With reference to sales, although Mr. Ewald always kept a string on the sales and the business of the St. Louis house.

Q. Always did what?

A. Always kept a string on it.

Q. He kept a string on it all the time, didn't he?

A. He never let go; he was the main dominating figure, and reports were made to him every day as to what was doing in the St. Louis office.

Q. You mean, reports were made to him as president of the company?

A. Yes, sir; he was president and treasurer.

Q. But the books of the company continued to be kept in St. Louis?

A. Yes, sir, those books relating to sales, the sales books, and invoice books from the mills, invoices we received from the mill were added on our invoice book the same as from any other concern.

Q. Were you ever at the Louisville office?

A. Yes, sir.

Q. Who was the bookkeeper there?

A. Dr. Thomas Schaefer, I think.

132 Q. You don't know when he quit the concern?

A. I don't know; I think as I said before, I have an idea that he was still there when I left, but I don't know how soon after that he quit.

Q. Now isn't it a fact that up to the time you left the company that all salesmen of the company were employed in St. Louis?

A. After I left the company?

Q. Up until you left the company.

A. That is only partly true.

Q. And were paid from the St. Louis office?

A. They were paid from the St. Louis office. Sometimes they reported, when they had anything urgent or special or important they would consult Mr. Ewald at Louisville.

Q. All you mean to say is, that when, Mr. Ewald was in Louisville, they would consult him there, if there, and when he was in St. Louis they would consult him here, if here?

A. Yes, sir.

Q. But, as a matter of fact, the office continued just exactly the same after the purchase of the Louisville plant as before, did it not?

A. So far as the sales department was concerned, yes.

Q. Was not St. Louis considered the head office of the Ewald Iron Company at all times?

A. I don't know how to answer that. In some ways it was. In this respect—what I mean is, we handled our customers for the product of the Louisville mill and also for the product of material bought elsewhere through the St. Louis office.

133 Q. Was not the sales made from the mill direct inconsiderable as compared to the business done by the Ewald Iron Company?

A. No, I would not say that.

Q. I will ask you if you did not give your deposition in the case of Harry F. Ewald against Stanley D. Seaman, et al?

A. Yes, sir.

Q. I will ask you if you were not asked this question and if you did not make this answer (reading): "Question: Before and after the purchase of the mill in Louisville, Kentucky, where was the head office and general place of business of the Ewald Iron Company? Answer: I should say, if I remember right, that St. Louis was the head office?"

A. That is about what I answered a moment ago.

Q. Isn't that true?

A. That is about true, yes sir; that is true. Understand this, though: Mr. Ewald always kept a sort of supervision—I don't know how to express it—over the whole matter.

Q. Why certainly; that is the duty of every president of a concern, isn't it?

A. Yes, sir. If there was anything important, I had to consult Mr. Ewald; on general business, I did not have to consult him.

Q. I am speaking about you being the head officer; I am talking about the office of the company.

A. Yes, sir, I see.

Q. As a matter of fact, the office of the company, the principal place of business of the company was always considered St. Louis was it not?

A. I think you might find that information on the cards and on the printed matter.

Q. Isn't that true?

134 A. That is true.

Q. Didn't your printed matter show that St. Louis was the head office of the company?

A. Yes, sir.

Q. And wasn't it known as a St. Louis concern?

A. Yes, sir.

Q. And wasn't your business done in Missouri entirely irrespective of business in Kentucky except insofar as the manufacture of iron was concerned?

A. Yes, that is about right too.

Q. You had assets in St. Louis?

A. Yes, sir; we had a bank account here.

Q. You had a warehouse?

A. Had a warehouse.

Q. Had material, stock of goods in that warehouse?

A. Had a stock of goods in that warehouse, yes.

Q. How many people did you employ here in the office?

A. Most of the stock we had, of course, was the product of the mill at Louisville.

Q. How many people did you employ here?

A. Well, now, I don't remember now; not a great many. Let me see; now, I cannot remember, but not a great many.

Q. Well, approximately.

A. Well, say about including the salesmen, the bookkeeper, and the—would you include the drivers?

Q. Everything you employed.

A. Oh, about ten.

Q. Now as a matter of fact, isn't it true that no records were kept at Louisville except mill records, that no general bookkeeping was done there at all?

A. The mill had its own independent books, and kept them there at Louisville.

Q. Those books did not cover your records in St. Louis?

135 A. No, sir.

Q. They were independent of them?

A. Yes, sir.

Q. The money that came to the St. Louis branch was not entered on the records at Louisville?

A. No, sir.

Q. The money deposited in the St. Louis banks came from the St. Louis business, did it not?

A. Yes, sir.

Q. And that was not of record and not concerned with the Louisville books?

A. That is, the deposits, you mean?

Q. Yes.

A. No, that is right.

Q. You paid a license tax on the gross business done by the Ewald Iron Company in St. Louis, did you not?

A. Yes, sir.

Q. All the business from which any money deposited in banks in St. Louis was covered by a license tax paid by your concern in St. Louis?

A. Yes, sir, that is my recollection.

Mr. Crawford: That is all.

The Witness: You know that is so long ago my memory is not clear on all these subjects.

Mr. Crawford: That is all.

Redirect examination by Mr. Tabb:

Q. I will ask you, Mr. Burg if you remember whether the Ewald Iron Company paid a license tax on money deposited in bank?

A. I don't know what you mean by that "license tax." I want to say this: That former question, did I understand it correctly? Did you mean to say "Did you pay your license for your sale and stock in Stock in St. Louis?" That is what you meant, wasn't it?

Mr. Crawford: Yes sir.

Mr. Tabb: That is not what the question reads.

Mr. Crawford: Let him re-read the question to him.

136 (Question read as follows: "All the business from which any money deposited in banks in St. Louis was covered by a license tax paid by your concern in St. Louis.")

A. That is kind of vague about that: I can't quite understand it.

Mr. Tabb: I will ask you if you understand what that question means?

A. I don't to tell you the truth.

Q. Mr. Burg, before the Ewald Iron Company was incorporated and purchased a mill at Tennessee Rolling Mills in Kentucky, did it manufacture any iron?

A. No, sir.

Q. What was the nature of the concern then before the incorporation?

A. What we called jobbers, bought and sold.

Q. When you moved from Lyon County to Louisville, I will ask you whether or not you left any machinery in Lyon County that was of any use for milling purposes?

A. Well, I was not on the ground, but I should say not.

Mr. Crawford: Objected to.

The Witness: I understood from Mr. Ewald that we moved everything that was of any use to Louisville.

Mr. Crawford: Objected to.

Mr. Tabb: Now, I will ask you this question: I will ask you if some of the money deposited in St. Louis by the Ewald Iron Company did not come from profits on iron manufactured at Louisville?

A. Why, it certainly did.

Q. Mr. Burg, after the Ewald Iron Company commenced to manufacture iron after its incorporation, I will ask you what proportion the business done in handling iron and steel manufactured by other concerns bore to the business of handling iron and steel manufactured by the Ewald Iron Company?

137 A. You mean as to earnings?

Q. Yes, sir.

A. Why the material received from the mill gave us the biggest earnings.

Mr. Tabb: That is all.

Recross-examination by Mr. Crawford:

Q. Mr. Burg, I believe you stated you did not understand my question regarding the payment of the license tax in Missouri?

A. Yes, sir.

Q. I will ask you if it is not true that all money deposited in St. Louis arose out of dealings made between the St. Louis office of the Ewald Iron Company and customers of that office?

A. Why surely.

Q. In other words, that money represented money received by the St. Louis office from sales made through the St. Louis office?

A. Yes, of the material manufactured in Louisville, largely.

Q. And of other material purchased and sold?

A. Yes.

Q. And of real estate sold in St. Louis?

A. No, sir, not real estate; I don't know anything about that. The real estate was always done by Ewald himself personally. There was no real estate transactions by the Ewald Iron Company except the purchase of the Louisville plant; that is all I know about.

Q. Now, you paid a license tax in Missouri?

A. Now, wait a minute; what do you mean by "license tax?"

You mean a license for—

Q. For doing business.

A. For doing business?

138 Q. Yes, based on the gross sales made by your concern?

A. In St. Louis?

A. Yes.

A. Yes, sir.

Q. And those sales covered the sources of all money deposited in St. Louis banks by the Ewald Iron Company?

A. I could not answer that; I don't know.

Q. You know that you reported the gross amount of sales made by the St. Louis office, did you not?

A. In paying our license at the end of the year?

Q. Yes.

A. Yes, sir; I always made that report.

Q. And all money deposited in banks in St. Louis came through those sales, did it not?

A. Well, I don't know.

Q. Why not?

A. If you ask me whether I reported all the sales of the St. Louis office and paid the taxes on it, I will say yes.

Q. From those sales you received money which you deposited in the St. Louis banks?

A. Yes, sir.

Q. Did you have any other sources for receiving money which you deposited in the St. Louis banks other than those sales you have just referred to?

A. Well, I could not remember now; none that I know of.

Q. The gross sales included the profits arising out of the iron made at the rolling mill in Kentucky as well as that purchased and sold from the open market?

A. Yes, sir.

Mr. Crawford: That is all.

Redirect examination by Mr. Tabb:

Q. Where were the mill profits deposited?

A. Why, along with the other profits. There was no distinction

made; they were all deposited together; all of the profits of the concern were deposited in bank.

Q. In St. Louis?

A. St. Louis, that is, all sales in St. Louis. This has no reference to anything that they made in Louisville; they made sales down there independent of our sales.

Q. Where was the profit of those sales deposited?

A. That was credited to the mill account.

Q. Where was the money deposited?

A. Well, I don't know that; I don't know anything about that.

Mr. Tabb: That is all.

(Signature waived.)

JAMES M. BUICK, called on behalf of the complainant, duly sworn and examined by Mr. Tabb, testified as follows:

Q. Mr. Buick, please state your full name and occupation?

A. James M. Buick, Vice-President of the American Car and Foundry Company.

Q. I will ask you Mr. Buick, did the American Car and Foundry Company buy out the St. Charles Car Company, the stock of the St. Charles Stock Company?

A. Yes.

Q. When was that approximately?

A. About March 1st, 1899.

Q. I will ask you whether or not the American Car and Foundry Company acquired the stock of the Helmbacher Forge and Smelter Company?

A. And Rolling Mill Company, Helmbacher Forge & Rolling Mill Company.

140 Q. Can you say about when that was?

A. That was about May 1911.

Q. State whether or not it acquired the entire stock or had a controlling interest in the Helmbacher Forge and Rolling Mill Company?

A. The Car Company of itself did not have a controlling interest, but the Car Company and the officials and their associates had control.

Q. Can you say for about how long that was before you acquired the control finally, and why you did not acquire control before?

A. When we first became interested in the Helmbacher Company, we attempted to purchase all the stock, but there was one or two stockholders that held out, that did not turn in their stock; so we continued to run it as a separate corporation until along about May, or June, 1911.

Q. Could you state whether or not L. P. Ewald was one of those stockholders?

A. Yes, sir, he was.

Q. Do you happen to know how many shares of stock he had?

A. I do not remember exactly, but it was somewhere in the neighborhood of 400 shares, I think. I might state that our assistant

secretary, who is familiar with all the details, has been sick, and he is confined to his home, so I am going simply by my recollection; he has all the records. It was in the neighborhood of 400 or 425 shares, I believe.

Q. Could you state how long the American Car & Foundry Company run the Helmbacher Forge & Rolling Mill Company as
141 an independent concern before it absorbed it?

A. To the best of my recollection we acquired an interest first along about 1902 or '03, and continued in operation up to the time that we liquidated it.

Q. Was L. P. Ewald one of the stockholders of the Helmbacher Forge and Rolling Mill Company in 1902?

A. Yes, sir.

Mr. Crawford: Objected to.

Mr. Tabb: I will ask you whether or not he continued to be a stockholder of the Helmbacher Forge & Rolling Mill Company until the time of his death?

Mr. Crawford: Objected to.

A. Yes.

Mr. Tabb: I will ask you to state the value, as nearly as you can, of the Helmbacher Forge & Rolling Mill Company stock from the time that the American Car & Foundry Company became interested in it up until date.

Mr. Crawford: Objected to.

A. I do not think we ever considered the stock was worth more than about 130—\$130 a share. There was very few transfers of the stock, as it was mostly held by officials of the company, and a few of their friends. My recollection is, there was one or two small lots of five or ten shares that were sold at about 140, but we never considered the value of the stock in excess of 130, and that was the price at which we turned in the stock at the time the car company took it over.

142 Q. Were you familiar with the value of the stock from about 1902, when the American Car & Foundry Company became interested in it?

A. Just in a general sort of way.

Q. Do I understand that \$130 is about the value of that stock, the Helmbacher Forge & Rolling Mill Company stock from 1902 up until date?

A. Yes, sir, about that.

Mr. Tabb: That is all.

(Signature waived.)

GEORGE P. HERRMAN, called in behalf of the complainant, being duly sworn and examined by Mr. Tabb, testified as follows:

Mr. Herrman, I will ask you your full name.

Q. George P. Herrman.

Q. Where do you live, Mr. Herrman?

A. St. Louis, Missouri.

Q. What is your residence address here?

A. 2608 Locust Street.

Q. Were you ever connected with the Ewald Iron Company?

A. Yes, sir.

Q. For how long—during what years?

A. From, I think it was 1873, about that time, to 1889; and from January, 1903 to the spring of 1905.

Q. Now, during your connection just in a general way what were your duties?

143 A. Well, I started in as office boy, and shipping clerk, and bill clerk, and then became bookkeeper.

Q. How long were you bookkeeper, would you say? Do you know about when you became bookkeeper?

A. For many years—I could not state the exact years—that was my principal work there.

Q. Could you say you were bookkeeper from—How long before 1899 would you say you were bookkeeper?

A. Oh, I should say fully ten years, I should think more or less.

Q. Were you bookkeeper after you came back in January, 1903?

A. No, sir; Mr. Arbuckle kept the books at that time.

Q. Was Mr. Arbuckle connected with the company before you left in '99?

A. Yes, sir.

Q. What was his capacity then?

A. He was bookkeeper.

Q. Were you under him or over him before you left in '99?

A. Well, I was supposed to be over him.

Q. Now, do you know how long he has been with the concern?

A. Well, I don't know exactly, but it was over ten years.

Q. Was he with them during your absence, do you know?

A. Yes, sir, he was there during my absence after 1899.

Q. Was he with them when you came back?

A. Yes, sir.

Q. And when you left again in 1905?

A. He was still there, yes, sir.

Q. Now, what were your duties from January, 1903, until the spring of 1905 when you left? What was your position?

144 A. Assistant treasurer.

Q. Mr. Herrman, did you know that the Ewald Iron Company had on deposit in St. Louis in 1903, about September, a million dollars, approximately?

Mr. Crawford: Objected to.

A. In September, 1903?

Mr. Tabb: Yes, sir.

A. Well, it may have been that amount; may have been slightly under.

Q. Do you know in what banks in St. Louis the Ewald Iron Company had deposits?

A. Yes, sir.

Q. Tell us.

A. It was the Fourth National Bank——

Mr. Crawford: Objected to.

A. ——the St. Louis Union Trust Company, the State National Bank, the Boatmen's Bank, and the Franklin Bank.

Mr. Tabb: I believe the Fourth National Bank was afterwards absorbed by the Bank of Commerce, was it not?

A. Yes, sir, it was.

Q. In which of these banks did the Ewald Iron Company carry its active checking account?

A. In the Franklin Bank.

Q. Now, explain in a general way how that checking account was handled, how expenses were paid, and so forth, from that account?

Mr. Crawford: Objected to.

A. Well——

Mr. Tabb: Who signed the checks?

145 A. The manner of signing the checks——Mr. Ewald signed the checks payable to my order, and when we needed any money or drafts for any purpose I endorsed the checks and got the money at the Franklin Bank.

Q. State whether or not checks would be forwarded to Louisville, made payable to you, the amount being blank, to be signed by Mr. Ewald?

A. Yes, sir.

Q. Was this customary arrangement?

— That was customary when he was at Louisville. I think when he was at St. Louis, he signed checks here before going back to Louisville.

Q. Now, when money was forwarded to Louisville for the expenses of the mill, I will ask you how that money was gotten?

A. We got a draft from the Franklin Bank on Louisville or New York payable to the Ewald Iron Company and sent it to Louisville.

Q. How would you pay for that draft?

A. We would give our check endorsed by myself for the amount.

Q. One of the checks referred to as having been signed by Mr. Ewald?

A. Yes, sir.

Q. Payable to you?

A. Yes, sir.

Q. I will ask you whether or not the deposits in the name of the Ewald Iron Company in the other banks named by you than the Franklin Bank were ever checked against, through your office, or were for the most part checked against Mr. Ewald individually?

A. That was checked against by Mr. Ewald individually, those other accounts outside of the Franklin Bank.

146 Q. I will ask you what his instructions, if any, were to you with reference to the amount of deposits he carried in the Franklin Bank?

Mr. Crawford: Objected to.

A. Our general instructions were to not let money run over twenty to twenty-five thousand dollars. In case it were over—we had checks to deposit which would run it over that amount, we would deposit them in the other banks.

Mr. Tabb: What were those other accounts in these other banks known as?

Mr. Crawford: Objected to.

A. Reserve accounts, I suppose.

Mr. Tabb: Could you state about, approximately, what amount of money the Ewald Iron Company had on deposit in those other banks in the reserve account, say, in 1903, and '04 and '05, up until the time you left?

A. Well, the total was around a million dollars; I could not give the exact amount, though.

Q. Mr. Herriman, were you with the company when Mr. Burg sold out his interest?

A. Yes, sir.

Q. Was there any other stockholder at that time, from then on, than Mr. Ewald?

A. There was Dr. Schaefer.

Q. Do you know when he sold out his interest, about?

A. It was a few years after Mr. Burg left; I do not know the exact year.

Q. Could you say whether it was before or after the year 1900?

A. I think it was before.

Q. I will ask you to state whether or not from the time
147 that Dr. Schaefer sold out his interest there was any other stockholders than Mr. Ewald?

A. There *was* none to my knowledge.

Q. What was the usual custom of Mr. Ewald with reference to instructions concerning the business, how would he communicate with the office when in Louisville?

Mr. Crawford: Objected to.

A. Well, he would telephone, and he would—his principal communications *was* by telephone.

Mr. Tabb: How often did he telephone each day, about?

A. On an average of about twice a day.

Q. During your connection with the concern from the time you became bookkeeper, did you have access to all the books of the company in the St. Louis office? Were you familiar with what books the company had?

A. I never had access to the stock book, but the balance I had access to.

Q. Were there any minutes of stockholders' meeting or directors' meeting?

A. I have never seen any.

Q. Did you ever know or hear of any directors' meeting in St. Louis?

Mr. Crawford: Objected to.

Mr. Tabb: Or stockholders' meeting.

A. I cannot recall any.

Q. From the time, January, 1903, until 1905, when you left, do you know whether or not the Ewald Iron Company ever declared any dividends?

A. No, they did not.

148 Q. Did they use to declare dividends?

A. They did before that, yes, sir.

Q. Do you know why they did not afterwards?

A. No, I don't know the reason, unless it was because Mr. Ewald was the sole stockholder.

Mr. Crawford: Objected to.

Mr. Tabb: Mr. Herrman, were you with the company when a certain piece of property—I believe it was on Second Street—was bought by Mr. Ewald and was afterwards sold to the Wabash Railroad, or the Rock Island Railroad?

A. Yes, sir.

Q. Do you know about how much that property brought that was sold?

A. It was about eighty or eighty-five thousand dollars, according to the best of my recollection.

Q. What was done with that money?

A. It was deposited in the Boatmen's Bank to the credit of the Ewald Iron Company.

Q. Do you know how it was carried on the books of the company?

A. It was carried in the real estate account, I suppose, yes, real estate account. At the time of the sale of the real estate, the real estate account was credited with the amount.

Q. Do you know about when that sale was made?

A. I do not remember the year; it was after 1900, though.

Q. Do you know about how much profits was made out of that transaction?

A. The profit was about \$40,000, according to my recollection.

149 Q. Mr. Ewald had considerable real estate in St. Louis, did he not?

A. Yes, sir, Mr. Ewald personally.

Q. Did this office of the Ewald Iron Company collect the rent from that real estate?

A. No, sir.

Q. Who did collect the rent?

A. Moffitt and Francissus collected for part of it, and the Western Union Telegraph Company remitted direct for their rent of the Pine Street property.

Q. On what street?

A. Pine, between Fourth and Broadway.

Q. Do you know or remember how much rent was paid for that Pine Street property?

A. \$375 a month.

Q. Now, to whom would that be made payable?

A. To Mr. Ewald.

Q. Individually?

A. Yes, sir.

Q. What would be done with that money?

A. Well, he usually endorsed those checks all over to us—to the Ewald Iron Company, and they were deposited in the St. Louis Banks to the credit of the Ewald Iron Company and Mr. Ewald's account was credited on the Ewald Iron Company's books.

Q. For the amount of the rent?

A. For the amount of the rent.

Q. Do you remember how much rent was gotten from the property handled by Francissus?

A. I do not remember exactly what that was; a couple of hundred dollars, though, anyway.

Q. A month?

A. A month, yes.

150 Q. What property was that?

A. It was on Third Street near Morgan, and there was another piece out on—residence property out on Westminster Place.

Q. To whom were those rents made payable?

A. To L. P. Ewald.

Q. What was usually done with that money?

A. That was usually endorsed over to the Ewald Iron Company also, the same as the other.

Q. And deposited?

A. Deposited to the credit of the Ewald Iron Company.

Q. Didn't Mr. Ewald have some stock in the Grandy Lead Mining & Smelting Company?

A. The Grandy Mining & Smelting Company, yes, sir.

Q. Did he ever get any dividends from that stock, to your knowledge, during your connection?

A. Yes, sir.

Q. Have you any idea what amount of dividends he got, about?

A. No, I could not say. I remember one check was about \$500; I cannot recall any of the others.

Q. Do you have any idea how often they came?

A. I do not think they came regularly from that company.

Q. What was done with those dividends usually?

A. He endorsed the dividend checks over to the Ewald Iron Company and had them deposited here in the St. Louis banks to the credit of the Ewald Iron Company.

Q. Were there any particular instructions with reference to which bank, for instance, money from dividends and rent should be deposited in?

151 A. No, it was a custom, though, to give it either to the Franklin Bank or the Fourth National; those two got the bulk of the deposits.

Q. What rule were you guided by in deciding which bank money should be deposited in, not only money coming from sales of iron, by the Ewald Iron Company, but rent and dividends on stock?

Mr. Crawford: Objected to.

A. Well, we deposited the money either in the Franklin or the Fourth National; we would put in the Franklin if it was below twenty thousand in order to keep that account up to the amount required, and if the Franklin was twenty-five thousand or over, then we put it into the Fourth National. Now, that I think of it, I think those are the only two banks that Mr. Arbuckle and myself deposited in. The other account was drawn out of the Fourth National. When the Fourth National got pretty heavy, Mr. Ewald had some of it drawn out and put into some other banking institution. That is the way the other banks got the deposit—from the Fourth National.

Mr. Tabb: You and Mr. Arbuckle had nothing to do with those other banks?

A. No; that was only done according to Mr. Ewald's directions; whenever he said to draw out, say, fifty thousand dollars out of the Fourth National and put it into the St. Louis Union Trust Company, then we did according to his directions.

152 Q. What was his reason, if you know, for limiting the deposit in the Franklin Bank to twenty or twenty-five thousand dollars?

Mr. Crawford: Objected to.

A. Well, that money was subject to our order, to my order, and sometimes to Mr. Arbuckle's order. I suppose he didn't want to leave too much money in the hands of other people.

Mr. Tabb: You mean subject to your order by reason of the check that he had signed to your order?

A. Yes, sir.

Q. As you have explained before?

A. Yes, sir.

Q. Do you remember whether or not Mr. Ewald had any stock in the Helmbacher Forge & Rolling Mill Company?

A. Yes, sir.

Q. Do you know how much stock he had in that?

A. No, I cannot say how much.

Q. Do you remember whether or not any dividends came through the St. Louis office of the Ewald Iron Company from that company?

A. Yes, sir, there were dividends.

Q. Do you know how often they came, about?

A. No, I cannot say how often.

Q. Do you know what the amount of them were, about?

A. I do not remember now. I never kept any record of the amounts received that way.

153 Q. You say the books of the Ewald Iron Company would not show any record of that?

A. Yes, sir. The books would show on Mr. Ewald's account. There was a credit made to Mr. L. P. Ewald on the Ewald Iron

Company's books whenever we received such checks for dividends or rents.

Q. Could you state whether or not the dividends from the Helmbacher Forge & Rolling Mill Company were more regularly than those from the Grandy Company?

A. I think they were.

Q. Could you say whether they were as regularly as semi-annually?

A. I think so.

Q. Now, what was done with those dividends? To whom were they made payable by the company—I mean by the Helmbacher Company?

A. They were made payable to L. P. Ewald.

Q. Now, what did he do with them?

A. He usually endorsed them over to us—to the Ewald Iron Company.

Q. Then what was done with them by the Ewald Iron Company?

A. The Ewald Iron Company deposited them in the St. Louis Banks. Of course, there may have been cases when Mr. Ewald deposited some of those checks to his own credit. Of course, I would not know anything about that. He had a personal account at the Boatmen's; I would not know anything about that if he did that; but his custom was usually to endorse them over to the Ewald Iron Company.

154 Q. Do you know any other place he had a personal account?

A. No, sir, I do not.

Q. Do you know of any other real estate deals that were made by Mr. Ewald which property was bought and sold while you were with the company?

A. No, sir.

Q. Other than that you have referred to above, regarding the Wabash Railroad?

A. No, that is the only one that I recollect.

Mr. Tabb: That is all.

Cross-examination by Mr. Crawford:

Q. Mr. Herrman, you say you went with the Ewald Iron Company in 1873?

A. About that time, yes, sir.

Q. Where was it doing business at that time?

A. On the levee.

Q. Whereabouts?

A. In the vicinity of Pine or Olive.

Q. In St. Louis, Missouri?

A. In St. Louis, Missouri, yes, sir.

Q. Was it in business in Kentucky?

A. At that time?

Q. Yes?

A. No, sir.

Q. It continued as an active concern in Missouri, did it, until it purchased a rolling mill in Lyon County, Kentucky?

A. Yes, sir. Well, at that time the firm was L. P. Ewald & Company, in 1873.

Q. Well, it continued doing business, did it not?

A. Yes, sir.

Q. Up until the purchase of the Tennessee Rolling Mill?

A. Yes, sir.

155 Q. It then continued doing business just the same in St. Louis?

A. Yes, sir.

Q. The same class of business?

A. Oh, virtually the same, yes.

Q. With the exception of the fact that it owned the rolling mill in Lyon County, Kentucky?

A. Yes; yes; they had a rolling mill at the time.

Q. The principal office of the company was still in St. Louis?

A. Yes, sir.

Q. And that continued until it purchased a rolling mill in Louisville?

A. Yes, sir.

Q. The principal office was still in St. Louis after the purchase of the rolling mill in Louisville, was it not?

A. Yes, sir.

Q. From the St. Louis office contracts were made and orders solicited?

A. Yes, sir.

Q. And at that office money received from the orders and contracts made through the St. Louis office?

A. Yes, sir.

Q. And that is the money that was deposited in the St. Louis banks?

A. Yes, the bulk of it, yes, sir.

Q. The overwhelming part of it, wasn't it?

A. Yes, sir.

Q. It was only some small items here and there that were received from any other sources?

A. Yes, sir.

Q. Now, you never considered that the Ewald Iron Company was anything but a Missouri concern, did you?

A. The Ewald Iron Company?

Q. Yes.

A. Well, we—

Q. I don't mean technically, now; I mean practically.

156 A. Why yes, it was a Missouri concern, although it was incorporated under the laws of Kentucky.

Q. You understood it was a Missouri concern having a Kentucky charter; that was the idea?

A. Yes, sir, that is it.

Q. But it was treated and considered by everybody in the St. Louis office as a Missouri proposition, practically; that is right, isn't it?

A. Well, this was considered headquarters.

Q. That is what I mean; the stationery showed it, too?

A. Yes, sir.

Q. And the only thing that was kept at either Lyon County or Louisville was mill account books?

A. Yes, sir.

Q. The books of the concern were in St. Louis?

A. Yes, sir.

Q. And you were the assistant treasurer in St. Louis?

A. Yes, sir.

Q. You considered Mr. Ewald a St. Louis man, did you not?

A. Yes, sir.

Q. He had a home here?

A. Yes, sir.

Q. He had an apartment at the Southern Hotel?

A. Yes, sir.

Q. And spent most of his time there until the last few years of his life?

A. Well, I don't know about most of his time.

157 Q. Well, a great part of his time?

A. Of course, after he bought the mill, a great deal of his time was spent there. He was virtually in charge of the mill.

Q. Well, he spent a large part of his time in St. Louis, did he not?

A. In what years do you refer to?

Q. Four or five years before his death?

A. I left there in 1905; that was four years before his death. I could not say about that.

Q. I am not speaking of the time you were not with him, but the time up to the time you left.

A. Well, he—at the time I left, he spent most of his time at Louisville.

Q. That was just directly before you left, was it not?

A. Yes, sir; yes, sir.

Q. His family was a St. Louis family, was it not?

A. His brothers and sisters, yes.

Q. He was an unmarried man, was he not?

A. He was an unmarried man so far as I know.

Q. How did you come in contact with Mr. Tabb (indicating) this gentleman here? How did you meet Mr. Tabb?

A. At my room, where I live.

Q. How did he happen to know you were connected with the Ewald Iron Company?

A. I don't know where he got his information.

Q. You just voluntarily give any information anybody asks you about this company, do you?

A. Well, I have done so, yes, sir.

158 Q. Have you been approached in the contest cases over Mr. Ewald's will?

A. No, sir, I have not.

Q. In the contest now being made by a woman named Golden?

A. No, sir.

Q. Now, Mr. Ewald had a personal account in the Boatmen's Bank here, did he not?

A. Yes, sir.

Q. He also had a personal account with the Ewald Iron Company?

A. Yes, sir.

Q. And on that personal account a record was kept of the credits to him and charges to him?

A. Yes, sir.

Q. Whenever he individually drew money for his own use he was charged with that?

A. Yes, sir.

Q. And when he made these deposits, such as you have just indicated here, he was credited with them?

A. Yes, sir.

Q. Now, these deposits that you have spoken of being made and credited to his individual account were all of profits arising out of holdings he had in St. Louis, were they not, or Missouri? Take them up seriatim; the rent claims were all rents from property owned by Mr. Ewald in Missouri?

A. Yes, sir.

Q. The forge company stock, that was not a Kentucky concern, was it?

A. No.

Q. That was a Missouri concern?

A. It was, to the best of my knowledge.

Q. Now, this mining company you spoke of, was that a Missouri concern?

A. That was a Missouri concern, yes, sir.

159 Q. You don't know of any money made by Mr. Ewald individually that was deposited here in Missouri, do you?

A. No, sir.

Q. You spoke of the property sold to the Wabash; where did the money come from that paid for that property?

A. From the Wabash Railroad Company.

Q. I mean that bought the property that was sold?

A. The Ewald Iron Company paid for that.

Q. In other words that was an Ewald Iron Company deal?

A. Yes, sir.

Q. And was not an individual deal of Mr. Ewald's?

A. No, sir.

Q. And the profit that arose from that, arose out of a transaction had exclusively in St. Louis, Missouri, and with which Kentucky had nothing to do, one way or the other?

A. That is right.

Q. I understand you to say that you had authority to check on the Franklin Bank; in other words, you were given blank checks signed by Mr. Ewald which you could fill in on the Franklin Bank?

A. Yes, by endorsement.

Q. And that was the reason that the account was limited?

A. I think so.

Q. In what bank?

A. Yes, sir.

Q. In other words, instead of having you under bond he just limited the amount that you could check on?

A. That was my understanding.

Q. It was not any differentiation between property in one bank of the Ewald Iron Company and property in another bank of the Ewald Iron Company, was it?

160 A. No, sir.

Q. The accounts in the other banks were merely known as the reserve accounts of the Ewald Iron Company?

A. That is what I should call them.

Q. Were you with the company when the Louisville plant was bought?

A. Yes, sir.

Q. Do you know when that was?

A. I cannot recall the year, it has been so long ago.

Q. Do you know anything about what machinery was left in Lyon County after the purchase of the Louisville plant?

A. Well, they took the best part of the machinery to Louisville, I understand.

Q. You don't know what the intention of Mr. Ewald was with reference to re-habilitating the Lyon County plant, do you?

A. No, sir.

Q. He was president and treasurer of the company?

A. Yes, sir.

Q. You don't know what stock he may have sold to outsiders between 1899 and 1903, do you?

A. No, sir.

Q. And you say the amount on deposit in the bank to the credit of the Ewald Iron Company during the five years you was under that in the first part of that time and over it the latter part of that time and over it the latter part of the time.

Q. You don't know how much, though?

A. No, I could not say exactly.

Mr. Crawford: That is all.

161 Redirect examination by Mr. Tabb:

Q. Mr. Herrman, from 1903 when you went back to the company until you left, about how often would you say Mr. Ewald came to St. Louis?

A. Well, perhaps three or four times a year.

Q. Now, who had charge of fixing the prices which the products of the iron, the products of the Louisville mill, were to be sold?

A. Well, Mr. Ewald fixed the prices usually.

Q. He either fixed them or acquiesced in them; he knew; he was the man, wasn't he?

A. Yes, the salesmen had to consult him about it.

Q. Besides the iron manufactured by the mill at Louisville, I believe the Ewald Iron Company bought and sold iron from outside concerns, did it not?

A. Yes, sir.

Q. The only iron they manufactured was manufactured at Louisville, wasn't it?

A. Yes, sir. That is, before the—

Q. I am speaking of from 1900 down?

A. Oh, yes.

Q. From the time they established a mill in Louisville?

A. From the time they established a mill in Louisville, yes, sir.

Q. They never had any other mill?

A. They had a mill on the Cumberland River before that.

162 Q. But after they moved the mill to Louisville, did they ever use the mill on the Cumberland River?

A. No, sir.

Q. Now, what proportion would you say was the business of the company in selling the iron which the company manufactured—what proportion did that bear to the proportion of business in selling iron made by outside concerns, say from 1903 on?

A. Well, the largest part was the product of the mill at Louisville, of course, I don't know what percentage.

Q. As a matter of fact, the iron bought and sold from other mills was more or less of an outside issue, was it not?

A. Yes, sir.

Q. As compared with what was manufactured?

A. Yes.

Q. You say you considered the main office of the company in St. Louis; you also considered Mr. Ewald a St. Louis man, did you not?

A. Yes, sir.

Mr. Tabb: That is all.

Recross-examination by Mr. Crawford:

Q. This iron and stuff that was not manufactured in Louisville, was bought and paid for by checks from St. Louis deposits, was it not?

A. Yes, sir.

Q. The profits realized from that went into the St. Louis deposits?

A. Yes, sir.

Q. These transactions had nothing to do with Kentucky one way or the other, did they?

A. Nothing at all.

Q. The orders were solicited by men paid in St. Louis?

A. Yes, sir.

163 Q. And the goods were billed from St. Louis?

A. Yes, sir.

Q. And the orders were to St. Louis?

A. Yes, sir.

Q. And the whole transaction was a St. Louis transaction exclusively?

A. Yes, sir.

Q. Now, these goods from Louisville were billed to the St. Louis office at a given price, were they not?

A. Yes, sir.

Q. And the profit made considered as profit made by the St. Louis concern over what it sold from the mill price?

A. Yes, sir.

A. The profits were considered as owned by the St. Louis office?

A. Yes, sir, we looked at it that way.

Q. In other words, you paid the mill so much for the goods?

A. Yes, sir.

Q. And then the difference between what you got for them and what you paid the mill was the St. Louis profit deposited in bank here?

A. Yes, sir.

Mr. Crawford: That is all.

Redirect examination by Mr. Tabb:

Q. Mr. Herrman, weren't practically all the profits, and wasn't practically all of this large amount of money which you say approximated a million dollars on deposit in these banks, made out of iron manufactured in Louisville?

A. Well, not practically all; a large percentage; making a rough guess, I should think about 75%.

Mr. Tabb: That is all.

(Signature waived.)

164 (At 1:20 o'clock P. M., not being able to complete the depositions at this time, an adjournment was taken by consent of counsel until 2:30 o'clock P. M.; at which hour, I continued the taking of said depositions at the same place, the parties being present as before.)

HARRY M. BEER, called in behalf of the complainant, being duly sworn and examined by Mr. Tabb, testified as follows:

Q. State your full name, please.

A. Harry M. Beer.

Q. What is your business, Mr. Beer?

A. Bond and stock broker.

Q. What is your office address?

A. 507 Security Building, St. Louis.

Q. Mr. Beer, did you ever buy or sell any stocks for L. P. Ewald?

A. I did.

Q. Did you ever buy any Grandy Lead, Mining and Smelting Company stocks for him?

A. Yes, sir.

Mr. Crawford: Objected to.

Mr. Tabb: I will ask you when you bought that stock, and in what lots, and at what price?

A. In January, 1897, I sold Mr. Ewald 200 shares of Grandy Lead, Mining & Smelting Company stock at \$24.00 a share. On De-

ember 8, 1898, I sold him 300 shares of Grandy Lead, Mining & Smelting Company stock at \$36.

Q. Do you know what that Grandy stock was worth about September 1, 1903?

Mr. Crawford: Objected to.

A. In 1903?

Mr. Tabb: Yes, sir.

A. It was worth—I sold it at \$85 a share in 1903.

Q. Did you sell any of this of Mr. Ewald's?

A. No, sir.

Q. You sold some stock of other people at this price?

165 A. Yes, sir, in 1903.

Q. Do you know what it is worth today?

Mr. Crawford: Objected to.

A. It is worth \$100 a share.

Mr. Tabb: I will ask you to state approximately what Grandy Lead, Mining & Smelting Company stock was worth September 1, 1904?

Mr. Crawford: Objected to.

A. September 1, 1904?

Mr. Tabb: Yes; give a figure, as near as you can, that would approximate the value, whether more or less than September, 1903.

A. There had been a gradual advance; I did not sell any. The last sale I made of Grandy was 283 shares in 1908, at 102½. 1904, I would have to guess at it.

Q. I will ask you this: Can you state whether or not Grandy was worth more or less September 1, 1904, than it was September 1, 1903?

A. I would say more.

Mr. Crawford: Objected to.

Mr. Tabb: Now, would you say it was worth more September 1, 1905, or less than it was September 1, 1903?

A. More.

Mr. Crawford: Objected to.

Mr. Tabb: State whether or not it was worth more or less September 1, 1906 than it was September 1, 1905?

A. More.

Mr. Crawford: Objected to.

Mr. Tabb: State whether or not it was worth more or less September 1, 1907, than it was worth September 1, 1906?

166 Mr. Crawford: Objected to.

A. More. I will tell you what I might state here that I forget to state; I did sell stock as high—I sold stock in 1907 at 110.

Mr. Crawford: Objected to.

The Witness: The stock has sold as high as 110.

Mr. Tabb: That is Grandy?

A. Yes, sir.

Q. Do you know about what time in 1907 that was?

A. I don't know whether it was 1907 or '08; I have forgotten; it was about that time. That was the last sale I made.

Q. Mr. Beer, did you ever sell any stock of the St. Charles Car Company to Mr. L. Ewald?

A. Yes, sir.

Q. How many shares, and when?

Mr. Crawford: Objected to.

A. I sold him 100 shares in January, 1899, for \$100 a share.

Mr. Tabb: The St. Charles Car Company was afterwards absorbed by the American Car & Foundry Company, I believe?

A. Yes, sir.

Q. How long after that sale to Mr. Ewald of the St. Charles Car Company stock?

A. I don't think it was more than thirty days.

Q. Do you know what the American Car & Foundry Company paid for the St. Charles Car Company stock?

Mr. Crawford: Objected to.

A. \$185 a share, cash or stock.

Mr. Tabb: Did you sell Mr. Ewald some stock in the St. Louis Republic?

167 Mr. Crawford: Objected to.

A. Yes, sir.

Mr. Tabb: State in what lots and when, and at what price?

Mr. Crawford: Objected to.

A. November, 1895, I sold Mr. Ewald 12½ shares of St. Louis Republic stock at \$125 a share; January, 1895, sold him 25 shares at \$125.00 a share.

Mr. Crawford: Objected to.

The Witness: November, 1894, I sold him 50 shares at 130.

Mr. Tabb: Do you know whether he ever sold that stock?

A. Yes, sir.

Q. When and at how much—was it sold through you?

A. Yes, sir, through me, I sold it March, 1900, 87 shares for \$14,790, which amounts to \$170 a share.

Q. Did you ever sell him any stock of the Helmbacher Forge & Rolling Mill Company?

A. Yes, sir.

Q. When did you sell him stock, and in what amounts?

A. In September, 1899, I sold him 105 shares Helmbacher Forge at \$110.

Q. Did you ever sell him any more after that time?

A. December, 1899, sold him 150 shares Helmbacher Forge at \$111.

Q. Did you ever sell him any real estate?

A. Yes, sir.

Q. State when, if you will?

Mr. Crawford: Objected to.

A. May 1, 1898, sold him the corner of Third and Lucas Avenue.

Mr. Tabb: At what price?

A. I fail to have the price for that.

168 Q. Have you any idea what it was?

A. Somewhere, it seems to me, about thirty thousand or forty thousand dollars, somewhere between thirty-five and forty thousand dollars.

Q. Did you sell him any other real estate?

Mr. Crawford: Objected to.

A. Yes, sir; July, 1897, sold him number 710 North Third Street for \$33,856.

Mr. Tabb: Do you know whether he ever sold that property?

A. I don't know.

Q. Did he ever sell any through you?

A. He never sold any through me.

Q. Did you ever sell him any more real estate?

Mr. Crawford: Objected to.

A. March, 1899, sold him what is called the Western Union Building, directly west of the Planters House on Pine Street between Fourth and Fifth Street for \$85,000.

Mr. Tabb: Now Mr. Beer, I believe you represented Mr. Ewald in what is known as the St. Louis & Carondelet Bridge Company?

A. Yes, sir.

Q. I believe he lost money in that?

A. Yes, sir.

Q. I wish you would state just what transaction — was.

Mr. Crawford: Objected to.

Mr. Tabb: Never mind stating it then.

A. I need not state it?

Mr. Tabb: No, sir. That is all I wish to ask him.

The Witness: Do you want to ask me about this Sempire Clock?

Mr. Tabb: No.

169 Cross-examination by Mr. Crawford:

Q. Mr. Beer, what is your motive for suggesting these transactions had between you as Mr. Ewald's broker and the representative of the City Attorney's office at Louisville?

A. What do you mean — suggest?

Q. You just asked him if he wanted to ask you about something else?

A. I just had a memorandum of things I told him, and he forgot the Sempire Clock Company, and I thought I would refresh his memory.

Q. You called his attention to these transactions when he first came to see you, did you?

A. Yes, sir.

Q. What was your purpose in that?

A. None at all.

Q. Is it customary for a broker to give away the so-called private transactions of his client?

A. Well, I don't know whether it is or not, if a man is dead.

Q. You think it is perfectly legitimate to do it if a man is dead?

A. Yes.

Q. When he is being sued by someone else?

A. I figure that they could make me tell it if they wanted to.

Q. You and Mr. Ewald had a falling out over the bridge matter you last referred to, didn't you?

A. Yes, sir, we had a little falling out about that.

Mr. Crawford: That is all.

Redirect examination by Mr. Tabb:

Q. Mr. Beer, I will ask you whether or not this information to which you have testified did not come after I had called at your office and asked you questions regarding these transactions?

A. Yes.

170 Q. Now, since the gentleman has referred to a falling out regarding this Carondelet transaction, I wish you would state, over his objection, just what that transaction was, tersely?

A. Well, some friends of mine told me——

Mr. Crawford: Objected to.

A. That the trust company had made up their minds, to build a bridge at Carondelet; it was called the Lincoln Trust Company at that time; whose president was a man named James B. Case; and he said if we could get somebody to buy that charter and hold it, the trust company would want to buy it, and we could make a profit on it, "and if you know of any customer that you would like to make some money for, I think you would do well to sell it to him." It looked good to me, and I went to Mr. Ewald and stated the case. It was in September of a certain year, and the price was \$5,000 cash and \$30,000 to be paid the following March. He bought it on a certain day, and paid for it about 11 o'clock in the morning, as I remember it; and my friend went up and told Mr. Case of the Lincoln Trust Company "You need not bother about buying that—figuring on that charter longer; it has been sold." And Mr. Case said, "You can go and say to whoever bought that that I will give them \$10,000 for it this afternoon and take the chance of my Board

approving it." And I reported that to Mr. Ewald and advised him not to sell. He then looked into the legality of the charter and was advised that it was not a good charter, and not legally a good charter, and he would not pay his other \$30,000 and he lost his \$5,000.

171 Mr. Tabb: State whether or not he had an opportunity to sell his option at \$10,000?

A. Yes, he had an opportunity, and I advised against it; I don't know whether he acted on my advice or not.

Q. Did he refuse to accept that offer?

A. He did not accept it.

Mr. Tabb: That is all.

Recross-examination by Mr. Crawford:

Q. He knew nothing about it except what you were telling him?

A. Oh, no; he took it on my judgment.

Q. He bought it on your judgment and he refused to sell on your judgment, and that was the whole transaction?

A. Yes, sir.

Mr. Crawford: That is all.

Mr. Tabb: You are here under a subpoena, are you not?

A. Yes, sir.

Mr. —: That is all.

(Signature waived.)

JAMES P. SWEENEY, called in behalf of the complainant, being duly sworn and examined by Mr. Tabb, testified as follows:

Q. Mr. Sweeney, what is your full name?

A. James P. Sweeney.

Q. Where do you live?

A. 1214 Shawmut Place, St. Louis.

Q. What is your occupation now?

A. I am teacher at the St. Louis University branch.

Q. I will ask you if you were ever employed by the Ewald Iron Company?

A. Yes, sir.

172 Q. Between what dates approximately would you say?

A. 1896, and I think I left the latter part of 1902.

Q. Where were you living at the time you were employed?

A. St. Louis,—my residence?

Q. At the time you were employed?

A. Here in St. Louis.

Q. Were you working here at that time?

A. Yes, sir.

Q. By whom were you employed?

A. By the Ewald Iron Company.

Q. I mean, what individual employed you?

A. Mr. L. P. Ewald.

Q. Now, what was your position with the company, Mr. Sweeney?

A. At the latter part I was secretary of the company.

Q. Could you say approximately for how many years?

A. Oh, I judge half of that time.

Q. The first part of your connection with the company, what did you do? What was your position?

A. Well, it would be hard to say. I was not employed in any clerical capacity. I was employed by Mr. Ewald; I may have to give this at a little length.

Q. That is all right, sir.

Q. Mr. Ewald employed me, and the stipulation was that I should not travel as a salesman; I did not want to travel. I came over with him.

Q. From where?

A. From Louisville. I was living then in Louisville. I came over with him, and he came with me, and he left a few days afterwards without instructing anybody as to what Mr. Sweeney's duties were, and I did not know—

173 Mr. Crawford: That is all objected to.

A. —except that I was employed by Mr. Ewald at a stipulated amount. When he came over afterwards he said he wanted me to feel comfortable, and I remarked "If I am not arrested for drawing my salary on the first of the month, I will feel very comfortable." He said, "Mr. Sweeney, I want you to absorb things." And that is all the instructions I had from Mr. Ewald.

Mr. Tabb: Well, did you absorb things?

A. I certainly did. That was all I had, and that was all the authority I wanted, and I began to learn the business.

Q. Now, tersely, until you became secretary what did you do?

A. I looked after the city business here with the railroads, purchasing agent, and the financial end, collection of the accounts, and adjusting of accounts with the railroads.

Q. I will ask you if, during your connection with the concern, there was any other stockholder in the Ewald Iron Company than Mr. L. P. Ewald?

A. I never knew of any. I had an idea that Dr. Schaefer was; that was his brother-in-law.

Q. Who was the dominant factor in the Ewald Iron Company during that time?

A. Mr. L. P. Ewald.

Q. He was the president of the concern, I believe?

A. President and general manager was his title.

Q. Now, what was the business of the Ewald Iron Company?

A. Manufacturing high grade iron; that was their principal business.

174 Q. Where did they manufacture that iron?

A. At Louisville, Kentucky.

Q. What were their chief grades of iron?

Mr. Crawford: Objected to.

Mr. Tabb: That they manufacture?

A. Tennessee Bloom——

Q. Was that the highest grade they manufactured?

A. Yes—sir—Laurel.

Q. Was that the next lowest, would you say?

A. Yes. E. I. C. and Boon; that was their lowest grade.

Q. Was this bar iron?

A. Bar iron yes, sir.

Q. Now, did the Ewald Iron Company manufacture anything else than bar iron?

A. They rolled steel plates, getting the slabs or billets from the manufacturer of steel and then rolled them into plates or sheets.

Q. Where was that done?

A. Louisville.

Q. Besides the iron manufactured by them and these steel plates, did they handle any other iron?

A. Common Merchant Bar.

Q. Where did they get that?

A. Wherever they could buy it to advantage.

Q. They did not manufacture it?

A. They did not manufacture it, no, sir.

Q. Did they do much or little business in iron, Common Merchant Bar Iron bought from other people?

A. Well, there was not a great desire to do very much business in that. It was called for by the consumers of the higher grades, and you might say for their accom-odation and to keep competitive trade from making an inroad it was carried. There was no

175 particular desire to do much of a business in Common iron.

Q. What was the principal business of the Ewald Iron Company?

A. Their high grade brands.

Q. From what, would you say, the major portion of their profits came, from the iron manufactured by them, or the iron bought?

A. Unquestionably the iron manufactured by them.

Q. What iron was advertised by the company?

A. Those brands that I have mentioned as the high grade.

Mr. Crawford: That is all objected to.

Mr. Tabb: Now, during your connection with the concern, where was Mr. Ewald most of the time?

A. In Louisville.

Q. How often would you say proximately would he come to St. Louis?

A. Well, he came when I first was there about every two weeks, and then again, maybe a month, maybe a little longer than a month would intervene.

Q. How long would he stay when he came?

A. Well, a week would be a long time; two or three days.

Q. Was Mr. Ewald constantly in touch with the company?

A. Yes, sir, I would think so. You would have to judge whether he was by asking me further as to——

Q. I will ask you to whom was the question of prices at which the iron was to be sold referred?

A. Mr. Ewald.

Q. What was his custom with reference to keeping in touch with the office at St. Louis? How was that done, by letter or——

A. It was a very systematic procedure for me to tell you.
176 There was a stipulated time that a telegram would be sent in the morning, after the morning delivery, which was about 11 o'clock, which would give the terms of the business received that morning, a brief telegram.

Q. That was sent from St. Louis to him?

A. From St. Louis to him. At half past two or thereabouts there was a telephone call, always for him, not from the St. Louis office; the St. Louis office did not call him; he called the St. Louis office, and then he would go into greater details with regard to the telegram. Maybe some other orders had come in the meantime, and that was explanatory of the orders received that morning. Then at five o'clock in the evening, or thereabouts, there was another call from him, and we would give him sort of a general summary of the orders, or any unusual thing that had occurred. You were asking me if he kept in touch. The ordinary routine of the office, the letters, would go to him. The orders would be sent, would be received and then I would send him a manuscript letter, a letter in my own handwriting with any comments I chose to make in regard to the orders, and explaining them, maybe confirming some of the conversation. So you can judge as to how close the man was in touch with his business. Pardon me again I want to satisfy you with regard to that question. When you say "in touch with his business" of course that means not only sales, but the financial and as well. He
177 received daily an account of the deposits put in the bank, and so he knew just what was going on. So I think it would be safe to say he was in very close touch with his business.

Q. Now, what books were kept at the St. Louis office? What would they show with reference to the profits?

A. The profits of the St. Louis office only, the St. Louis store only.

Q. What would show the profits on the iron manufactured at which it was sold to the St. Louis office?

A. That was solely in the possession—that information was solely in the possession of Mr. Ewald. We did not keep the books of the mill.

Q. Would the books of the St. Louis office show what it cost to manufacture this iron?

A. No, sir.

Q. Do you know how we could get at the net profit of any year made by the Ewald Iron Company?

A. No, sir.

Q. Why, Mr. Sweeney, could not that be done?

A. Unless you could get—when I say "No, sir," I am saying now from my standpoint: You could get at the profits of the St. Louis

office. Now, in regard to your ability to get the profit from the Louisville mill, that I don't know how you are going to do.

Q. Let me ask you this: When a sale was made through the St. Louis office—would it or not receive and bank the gross receipts of that sale?

A. Yes, sir.

Q. Do you know whether or not all the money made by the Ewald Iron Company was deposited in St. Louis?

178 A. I could not say that, for the reason that I don't know what the mill made.

Q. How were the expenses of the mill paid?

A. How were the expenses paid?

Q. Yes, sir.

A. It was not unusual to have a call by wire or telephone to send over three, ten thousand dollars for extra wants. That was the familiar words, "extra wants." That was sent over there.

Q. How would that be gotten, that money?

A. From the bank here.

Q. In what way? What would be the procedure?

A. Well, like in any ordinary procedure; we would send a New York exchange.

Q. How would you pay for the New York Exchange?

A. With the check he had sent signed in blank, signed payable to my order, and I would have the check made out for the New York exchange and send it over to the Ewald Iron Company at Louisville.

Q. Tell me in this connection, what the custom was with reference to Mr. Ewald signing the checks to be drawn for expenses here while you were with the company?

A. When he came over he would say, "Well, do you want any checks signed?" I would ask Mr. Arbuckle, our bookkeeper. "Yes." He would start off and sign maybe twenty-five, maybe more, not any particular number; and they were payable to my order and signed in blank. And then we would use those checks as they were called for to pay for the iron, and pay any expenses, and draw exchange,

179 like you mentioned there, or anything at his direction.

Q. State whether or not you ever forwarded checks from here over to Louisville to be signed?

A. You mean our receipts?

Q. No; checks for him to sign in blank?

A. Oh, yes; there would be sometimes that he would run short of checks, and he would maybe change his mind and say, "I cannot come over next week." I would say, "Well, we will send some checks over"; and we would send over a bundle of checks, which he would sign and send them back.

Q. Was some iron sold directly from the Louisville mill?

A. That I am not sure. I had an idea on account of its location, being so close to the L. & N. that there must be emergency orders in such a place as that, and his intimacy with Mr. Pulaski Leeds, the superintendent of motive power down there. I could understand in emergency orders they would call on the mill to get them to deliver, but I do not think that was of any very great extent.

Q. Any sales made through the St. Louis office, were those shipments that came direct from the mill?

A. Oh, yes, very, very many. You are talking about shipments?

A. Yes, sir.

A. Yes, sir.

Q. How was the billing done with reference to those shipments?

A. St. Louis office. All billing was done from the St. Louis office.

180 Q. Was that done with reference to all the sales made by the mill?

A. Yes, sir, all. As I say, possibly with regard to the L. & N.—but now, as my memory comes I can recollect of some deliveries made to them; but my recollection is that the St. Louis office was doing all the quoting, all the billing and all the collecting. The St. Louis office was the main office.

Q. Was the Ewald Iron Company a Louisville Company or a St. Louis Company?

A. A Kentucky corporation, as I understood it, always.

Q. Who else was connected with the company while you were there? Who was the treasurer?

A. In what capacity?

Q. Who was the treasurer?

A. Mr. Ewald. He had no officer advertised in that capacity at all, no treasurer.

Q. You were the secretary?

A. I was the secretary.

Q. What was Mr. Arbuckle's position?

A. He was bookkeeper.

Q. Who attended to the banking while you were there mostly?

A. Well, I directed it, and he did the depositing after my checking and seeing that it agreed with the cash book. All the cash that came through my hands.

Q. During your connection, I will ask you whether or not Mr. Ewald had any stock in the Helmbacher Forge & Rolling Mill Company?

Mr. Crawford: Objected to.

A. Yes, sir.

Mr. Tabb: Do you know how much stock?

181 A. I don't know sir. It was bought in at different times, and in different amounts?

Q. Was that stock in his name?

A. Some of it was in my name.

Q. Do you remember how much was in your name?

A. That I do not recall either.

Q. Who collected the dividends on that stock?

A. Well, I collected what was in my name; I think it was somewhere about eleven hundred or twelve hundred dollars at one time, I recollect.

Q. How often were those dividends paid?

A. I think that was an annual dividend. I am not quite sure. I knew I had no pecuniary interest in it, just merely acting for him.

Q. What was done with that money?

A. Turned into the general fund, and reported like a collection of the Ewald Iron Company.

Q. Do you know whether or not he had any stock in the Grandy Mining & Smelting Company?

Mr. Crawford: Objected to.

A. Yes, sir.

Mr. Tabb: Did you ever know of any dividends from that company?

A. No, sir. I have positive knowledge of that, of his having stock.

Q. Do you know anything about the transaction in which Mr. Ewald bought some stock of the St. Charles Car Company?

A. Yes, sir.

Q. Do you know what he paid for that about?

182 A. I think about \$7,500.

Mr. Crawford: Objected to.

Mr. Tabb: About when was that, do you know?

A. It was—I cannot recall the date, but that could be verified. It was when the consolidation of all those large companies into the American Car Company was going on.

Q. American Car and Foundry Company?

A. American Car and Foundry Company, yes, sir.

Q. Have you any idea what profit Mr. Ewald made out of that transaction?

Mr. Crawford: Objected to.

A. About \$7,500.

Mr. Tabb: How long did he hold that stock, do you know?

A. I don't think 30 days.

Q. I will ask you whether or not you ever opened for Mr. Ewald an account in the St. Louis Trust Company?

A. Yes, sir.

Q. In whose name was that account opened?

A. Ewald Iron Company.

Q. Do you know how much money was deposited at that time?

A. Deposited \$100,000.

Q. Do you know about when that was?

A. No, sir; I cannot recall the date.

Q. Could you tell whether that \$100,000 came from the profits of the Ewald Iron Company or from money made by Mr. Ewald—outside transactions?

183 Mr. Crawford: Objected to.

A. No, sir, I could not tell that; I could not tell where the money came from.

Mr. Tabb: Would there be any way to tell whether money on deposit in various banks in St. Louis in the name of the Ewald Iron Company came from profits of the Ewald Iron Company as a corporation, or from L. P. Ewald as an individual? Do you understand the question?

Mr. Crawford: Objected to.

A. The point is this: I believe I understand the question as you put it. You can understand, when a man took charge of the place and saw a balance in there, and keeps adding on to that, how can you tell where the other came from? I could not tell.

Q. Were the funds that were gotten from dividends on various stocks or profits out of stock transactions kept separate in any way from funds made out of iron sold when these deposits were made in the name of Ewald Iron Company?

A. I don't think so. The books would show. I think the books would show—Mr. Arbuckle in keeping the accounts as to where that would be charged—he had a personal account, of course. The personal account of Mr. Ewald would enlighten you on some questions you are asking me. Of course, I could not draw his personal account.

Q. During your connection with the company were there any stockholders' meetings in St. Louis?

A. No, sir.

Q. Any directors' meeting held?

A. No, sir.

184 Q. Did you ever see any minutes of any meetings of stockholders?

A. Oh, I saw a transcript from one meeting, yes, sir.

Q. When was that?

A. It was a case of the Ewald Iron Company holding stock in the American Brake Company.

Q. American Brake?

A. American Brake Company, and they were consolidating with a Pittsburg concern, I think the Westinghouse, and there was a choice of either cash or stock in the new corporation, and Mr. Ewald concluded to take the stock, and with the stock, it was payable in New York, and it was sent through the Fourth National Bank with his stock and returned, stated they had to have the attest from the secretary of the company showing that Mr. Ewald had the authority to sell this stock. I communicated that to Mr. Ewald, and he said—

Q. Where was he at that time?

A. In Louisville—and sent me over a letter, with a quotation in the letter stating that “At a meeting of the stockholders”——

Mr. Crawford: Objected to.

A. —“they had directed the president Mr. L. P. Ewald,” delegated to him this authority to do it. Of course, I had the signature of my president, and of course, I could make a copy of that, and that was the only thing of any kind that I knew of.

Mr. Tabb: Where was that meeting supposed to have been held?

A. Louisville.

185 Q. Do you know what year that was? Have you any way of fixing that?

A. No; I haven't any way of fixing that. Of course, by referring to memorandums and one thing and another, I could get you dates.

Q. Do you know who was secretary of the Ewald Iron Company before you went with the company?

A. Dr. Schaefer, his brother-in-law.

Q. Where was he living then?

A. Louisville.

Q. Do you know whether or not Dr. Schaefer sold out his interest in the company after you went with the company?

A. I don't know whether he had any interest in it.

Q. Did he become disconnected with the company after you went with the company?

A. After I was with the company, yes, sir.

Q. Who kept the books of the company at St. Louis?

A. Mr. Arbuckle.

Q. Was that during the entire time you were with the company?

A. Yes, sir.

Q. Who attended to most of the banking, Mr. Sweeney, made the deposits?

A. He did, for the reason that I was made during his lunch hour, as I explained to you there, after they had been passed on by me, just to see, checking up the receipts, what had gone through my hands. We received very little cash, so it was just merely a checking up of vouchers. The business was not very much of a—not very many cash transactions.

186 Q. Mr. Sweeney, I will ask you if you know how much surplus the Ewald Iron Company had on deposit in various banks in St. Louis at any time during your connection with the concern?

Mr. Crawford: Objected to.

Mr. Tabb: Who would know that, connected with the company?

A. Nobody but Mr. Ewald.

Mr. Tabb: That is all.

Cross-examination by Mr. Crawford:

Q. Mr. Sweeney, you had some disagreement with Mr. Ewald and quit the company, I believe?

A. Yes, sir.

Q. Mr. Ewald originally was a St. Louis man?

A. St. Louis man, born here, yes sir.

Q. His mother and father and brothers and sisters lived here?

A. Yes, sir.

Q. And you always considered him a St. Louis man?

A. Always, yes, sir.

Q. Even when he was temporarily or permanently residing in Louisville, you considered him a St. Louis man?

A. Yes, sir.

Q. That was what really first caused your acquaintance with him, the fact that you and he were both St. Louis men?

A. Yes, sir.

Q. You met him in the Galt House there and called his attention to that fact?

A. Yes, sir.

Q. And then you came over to St. Louis in his employ, I believe?

A. In his employ, yes, sir.

Q. Working for the Ewald Iron Company?

A. Yes, sir.

187 Q. That was about 1896?

A. '96. That date is correct, absolutely.

Q. Prior to 1880 the Ewald Iron Company had been doing business in St. Louis, I believe?

A. Prior to 1880; that is going beyond my administration.

Q. You don't know about that?

A. I know it is a very old firm here.

Q. In St. Louis?

A. Yes, sir; they are successors to the Hillmans.

Q. The reason I asked you that, you spoke of it as being a Kentucky corporation?

A. Yes, sir.

Q. I will ask you if, as a matter of fact it was not a St. Louis concern with a Kentucky charter?

A. I would think not. I will tell you why. My recollection is, that the letterheads had, "Ewald Iron Company, Incorporated"; and I was familiar with the Kentucky business, working down there with Belknap, and that struck me very markedly there, "Incorporated," which I believe is one of the stipulations of Kentucky corporations; and he so stated to me.

Q. I understand, Mr. Sweeney, that it had a Kentucky——

A. That it was incorporated in that particular way.

Q. Just a moment; Mr. Sweeney, I understand that the corporation was incorporated under the laws of Kentucky.

A. Yes, sir.

Q. What I am getting at is this: If it was not your understanding that the concern was a Missouri concern, which incorporated under the laws of Missouri to do business there.

188 A. No. Now, let me tell you why; you see, the concern originally was down in Lyon County, Kentucky.

Q. Aren't you mistaken about that?

A. Lyon County.

Q. Wasn't that concern originally in Missouri, and later went to Lyon County?

A. I think not.

Q. You don't know about that?

A. Because it succeeded the Hillman Brothers, and they were

there; and he always told me it was a Kentucky corporation; that was it.

Mr. Crawford: Objected to.

Q. I will ask you if it is not true that the Ewald Iron Company was doing business for many years in Missouri under the name of L. P. Ewald & Company prior to the ownership of any business in Kentucky whatsoever?

A. Yes, sir, under various titles, not only L. P. Ewald.

Q. And if finally they did not purchase the Hillman plant in Lyon County?

A. That was my understanding. Of course, I never saw any papers.

Q. I will ask you if it is not true that then is when the incorporation took place?

A. I could not tell you, because I don't know; perhaps it is true.

Q. Why do you say, Mr. Sweeney, that you understood the contrary then?

A. On his own say so to me, Mr. L. P. Ewald, that it was a Kentucky corporation.

Q. Where was the main office of the company?

A. St. Louis.

Q. Always was, wasn't it?

A. During my administration, always.

Q. You never knew anything else?

A. No, sir, I never knew anything else.

Q. It was so considereed at the main office by everybody?

A. Yes, sir; they did throw great stress on that.

189 Q. The advertising matter all showed that?

A. Yes, sir.

Q. All books of the concern except the mill books were kept here?

A. Yes, sir.

Q. All business was done through the St. Louis office?

A. Yes, sir.

Q. All goods were billed to the St. Louis office from the Louisville mill, were they not?

A. Yes, sir.

Q. And charged to this office at a certain rate?

A. At a certain rate, yes, sir.

Q. And then resold, or sold by the St. Louis office at a profit?

A. That is exactly the whole manipulation.

Q. The people that sold the goods were employed by the St. Louis office?

A. I never employed them.

Q. Well, somebody here did.

A. The Ewald Iron Company did.

Q. Mr. Sweeney, Mr. Ewald was president of the concern, was he not?

A. Yes, sir.

Q. And manager of it?

A. Manager.

Q. And he was as much manager of the St. Louis office as he was the Louisville office?

A. Yes, sir.

Q. Now, I will again ask you if it is not a fact that all salesmen, all solicitors, were employed by the Ewald Iron Company, reported to and were paid by the St. Louis office?

A. Yes, sir.

Q. They had nothing whatever to do with Kentucky except in so far as Mr. Ewald personally might be in Kentucky?

A. You have got the idea all right.

Q. Now, isn't it true further that the profits realized on the difference in the mill price and the sale price of the St. Louis office were all deposited in bank in St. Louis?

A. Yes, sir.

Q. To the credit of the Ewald Iron Company in St. Louis?

A. To the credit of the Ewald Iron Company.

Q. In St. Louis?

A. In St. Louis.

Q. And the St. Louis branch of the Ewald Iron Company, if you call it a branch——

A. If you choose to call it.

Q. —— you considered the head office?

A. Under the direction of my superior office, yes, sir.

Q. Now, you also deposited in bank here the profit made from the purchase of other material than manufactured by the Louisville plant?

A. Yes, sir.

Q. You don't know how much of the profits deposited in bank here were realized from the manufacture of iron in Lyon County, do you?

A. We manufactured no—During my administration?

Q. No, no; at any time;

A. No, no; because the mill was not operated during my time.

Q. I understand; but you don't know how much of the money——

A. No, sir.

Q. —that was in St. Louis was realized from iron made in Lyon County?

A. No, sir.

Q. You don't undertake to say that none was?

A. If I did, I would have to merely quote what Mr. Ewald said.

Q. I am asking about your personal knowledge.

A. No, sir, because it was not during my administration.

Q. Do you know anything about any sales of real estate here?

A. Do I know anything about it?

Q. Yes.

A. Somethings.

Q. Do you remember about the Ewald Iron Company purchasing the property afterwards sold to the Wabash?

A. I recollect the purchase, but I was not there at the time of the sale.

Q. That was Ewald Iron Company money that bought that property?

A. That bought that.

Q. And whatever profit was made——

A. Now, just a minute; allow me to collect myself; the Ewald Iron Company bought—that I do not recall.

Q. You, of course, do not recall that it was not Ewald Iron Company money?

A. No, I don't know just exactly; I cannot recall where that money came from to pay for that property.

Q. Now, these individual dividends that came to Mr. Ewald and were endorsed over and taken in on the books of the Ewald Iron Company were credited to his personal account?

A. I would judge so. That is why I say the bookkeeper——

Q. You don't know what the condition of his personal account was?

A. No, sir.

Q. Whether he had credit or debit?

A. No, sir.

Q. What money he wanted he got it?

A. Yes, sir, he got it.

Q. And he was charged with it?

A. Yes, sir.

Q. And as to whether the final balance was a credit or debit balance you don't know?

A. No, sir.

Q. I understood you to say in your direct examination that the deposits here were the profits of the St. Louis branch only; is that correct?

A. Yes, I would think that would be correct, because it
192 would be the collections from the sales, that would include the profit.

Q. You don't know whether the mill account has a credit or debit balance, do you?

A. I do not quite recall that, of course, just at the moment. It ought to have—however, broadly, we were like customers, so I guess our accounts were square.

Q. That is the point.

A. I would say so.

Q. In other words, you were—the St. Louis branch was in effect a brokerage concern contracting for the entire output of the Louisville concern?

A. In a way, yes, sir. I do not like the work "brokerage."

Q. Factor, we will say?

A. Factor is pretty near the same, isn't it?

Q. What would —— call it?

A. Representative.

Q. Representative; agent, in fact, then?

A. I do not want to weaken the standing of Mr. Ewald's St.

Louis office, because that was the strong office. I do not mean to speak of myself at all, but that was the strong office.

Q. The selling part of the concern is equally as important as the manufacturing, is it not?

Mr. Tabb: That is objected to as argumentative.

A. I think that is a matter of opinion.

Mr. Crawford: What is your opinion on it?

A. I think it is demonstrating the fact now that the important end is manufacturing down there.

Q. Mr. Ewald had a personal account in St. Louis, did he not?

A. Yes, sir.

Q. Where did he have his safety vault here?

193 A. I don't know.

Q. Boatmen's Bank?

A. I don't know.

Q. He did have one here, didn't he?

A. I don't know that, even.

Q. Do you know whether he kept stocks and bonds here?

A. No, sir.

Q. You don't know. You don't know where he kept those?

A. No, sir. But some stocks he might have kept in the private safe at the St. Louis office, in his compartment.

Q. His St. Louis stocks and bonds, where did he keep those?

A. As I say, I don't know, unless—he did have a compartment in our safe, in our own safe, not a large one, and he would occasionally take papers from there.

Q. You paid taxes in St. Louis on the gross amount of sales made by your concern, didn't you?

A. Yes, sir.

Q. That included all the stuff that run through the books of the company?

A. Yes, sir, sure.

Q. You were recognized as a considerable concern here in St. Louis?

A. Yes, sir.

Q. Mr. Ewald individually and the Ewald Iron Company donated money to the World's Fair here as a citizen of St. Louis?

A. Yes, sir.

Q. And residents of St. Louis?

Mr. Tabb: That question is objected to, because it is admitted he was a resident of the City of Louisville.

The Witness: Whether he donated to the World's Fair?

Mr. Crawford: Yes, sir.

A. He certainly did.

Q. A large amount of money?

194 A. A very large amount.

Q. How much, do you recall?

A. I think it was \$30,000.

Q. Part of it went in his name and part of it in the name of the Ewald Iron Company?

A. Yes, sir, the major part in his name.

Q. Of course, he gave his individual check for that, did he?

A. I do not recall just how that was.

Q. He had an individual checking account here?

A. I would not have access to his individual check book, and I forgot just how it was paid, but I rather think that it was his check.

Mr. Crawford: That is all.

Redirect examination by Mr. Tabb:

Q. Mr. Sweeney, you say that the iron was sold by the mill to the St. Louis branch at a certain price; did the St. Louis branch ever remit to the mill for that iron?

A. Well, we would have calls for money, as I mentioned previously, to send over three thousand, ten thousand dollars and so forth; he kept that all right, I guess; he was sending for the money, and we had to send it to him.

Q. I will ask you whether or not those calls were to pay the expenses of the mill, running the mill, or were they to pay for iron at the price sold to the St. Louis branch?

A. You see, you can understand if we sent the money, we would charge them with the money sent to them; as to what disposition they made of the money at the other end, we had no way of finding out.

195 Q. What I am trying to get at is this, though: When a sale was made by the St. Louis branch, state whether or not the gross amount of money received from that sale would be deposited in St. Louis in the name of the Ewald Iron Company?

A. Yes sir, the collection.

Q. Were all collections for iron sold by the Ewald Iron Company deposited in St. Louis?

A. Yes, sir, with that—just put that except with regard to some transactions down there that I did not know anything about.

Q. They were insignificant?

A. We never considered that important, because we were billing them right along in the regular way, large accounts. But the idea was to have all the affairs come through the St. Louis office, the quotations and shipments.

Q. Who employed the salesmen of the Ewald Iron Company?

A. Mr. Ewald—except—of course, when you say somebody else employed them it was certainly with his approval and understanding. I put a man in charge of the New York office; I employed him. Mr. Ewald had never seen him, but Mr. Ewald had a pretty good description of him and knew him before I employed him.

Q. Was this under instructions from Mr. Ewald?

A. From Mr. Ewald.

Q. Who made the prices of all iron.

A. Mr. Ewald.

Q. Who dominated the sales of the company?

A. Mr. Ewald.

Q. Who controlled the finances of the company.

A. Mr. Ewald.

Q. Who controlled the manufacture of the iron at the mill
196 in Louisville?

A. I would just have to say Mr. Ewald, because I have got to take his own statement for it.

Mr. Tabb: That is all.

Recross-examination by Mr. Crawford:

Q. You personally had nothing to do with the mill at Louisville?

A. No, sir.

Q. As far as you were concerned it was an entirely separate and distinct business?

A. Yes, sir.

Q. You knew nothing about it?

A. Nothing at all.

Q. You knew nothing about the profits made there?

A. No, sir.

Q. You did not know whether the goods were billed to you at a profit or loss or what, personally?

A. No, sir. I could not say that; not knowing what the cost was I could not say.

Mr. Crawford: That is all.

Redirect examination by Mr. Tabb:

Q. I will ask you just one more question—whether the Ewald Iron Company was known as a Louisville Company or as a St. Louis Company?

A. Known as a St. Louis Company or a Louisville Company?

Q. Whether you considered it a St. Louis company or a Louisville company?

A. I have answered that before, haven't I?

Q. I don't know.

A. Yes, I have. It was considered a Louisville company, a Kentucky corporation, and they were doing business here. That is the way I understood it. And as to just what arrangements he had made about operating under a Kentucky charter, that I
197 never knew except his own word, telling me it was a Kentucky corporation. As to the proper way of doing it, I don't know.

Mr. Tabb: That is all.

Recross-examination by Mr. Crawford:

Q. You say that you knew it as a Louisville concern; now, isn't all you knew, that it was a Kentucky corporation?

- A. Let me understand that again.
Q. Isn't it all you assume to say that it was a Kentucky corporation?
A. Yes, sir, Kentucky corporation.
Q. You don't mean Louisville?
A. No, no; I am speaking of Kentucky.
Q. It was a Kentucky corporation?
A. Yes, sir.
Q. That is what he told you, that it was a Kentucky corporation?
A. Yes, sir.
Q. He never told you that the head office was at Louisville did he?
A. No, sir, never was at Louisville; the main office was at St. Louis, and was so advertised.

Mr. Crawford: That is all.

Redirect examination:

- Q. I will ask you this question: As a Kentucky corporation did it do business anywhere else than in Louisville, to your knowledge?
A. As a Kentucky corporation was it doing business anywhere else—it did business all over the United States, or tried to.
Q. Where was its mill?
A. Louisville.
Q. Did it have any other office in Kentucky, or mill any place else, or manufacture iron anywhere else than in Louisville?
198 A. No, sir; it had property, but it was an abandoned mill; you have asked me questions about manufacturing; that old Lyon County outfit, there is nothing there; but that was the active mill at Louisville.

Mr. Tabb: That is all.

(Signature waived.)

Mr. Crawford: It is conceded that the piece of property known as the Wabash property on Second Street, which Mr. Herrman testified was purchased with the funds of the Ewald Iron Company was purchased for \$30,500.00, part of it November, 1897, and the other November 22, 1899, and was sold for \$75,000.00 in June, 1903.

STATE OF MISSOURI,

City of St. Louis, ss:

I, H. A. Buck, a Notary Public within and for the City of St. Louis, State of Missouri, certify that the foregoing depositions of Walter B. Donnell, William Burg, J. M. Buick, George P. Herrman, Harry Beer, and James P. Sweeney, were taken pursuant to agreement of counsel for the respective parties, before me, at the time and place and in the action mentioned in the caption; that said witnesses were duly sworn by me; that the evidence they should give in said action should be the truth, the whole truth and nothing but the truth; that said depositions were first taken in shorthand by me, and

199 a full, true and accurate transcript of same then made by
me; that the reading of said depositions to said witnesses,
and their signatures to same, were waived by counsel; that
Mr. George Cary Tabb appeared for the complainant, and Mr. W. W.
Crawford appeared for defendant.

I further certify that my fee for taking these depositions amounts
to \$45.10, and that same has been paid by complainant.

Witness my hand and Notarial Seal, this 19th day of April, 1913.

My commission expires October 29th, 1913.

[SEAL.]

H. A. BUCK,
Notary Public.

Said "Exhibit A" filed with the foregoing depositions on the 26th
day of April, 1913, is as follows, to-wit:

200

Ex. A. II. A. B.

The following is a full statement of all the property, real, personal or mixed, listed in the names of L. Phillip Ewald, Louis Phillip Ewald and Ewald Iron Co. as of June 1, 1903, 1904, 1905, 1906, 1907, and 1908 respectively as shown by the records of this office.

1904—City Book 15, Bill 1559—L. Phillip Ewald.

| City blk. | Street. | Front ft. | Valuation. | State. | School. | City. | Total. |
|-----------|-------------|-----------------|------------|--------|---------|---------|-----------|
| 67 | 3rd | 61 ⁶ | 22,950 | | | | |
| 67 | 3rd | 39 11/12 | 14,490 | | | | |
| 3926 | Westminster | 50 | 15,250 | | | | |
| Totals | | | 52,690 | 89,573 | 289,795 | 774,543 | 1,153,911 |

1904—City Book 15, Bill 1560—Louis Phillip Ewald.

| | | | | | | | |
|-----|------|----------|--------|--------|--------|---------|-----------|
| 101 | Pine | 39 11/12 | 47,960 | 81,532 | 263,78 | 705,012 | 1,050,324 |
|-----|------|----------|--------|--------|--------|---------|-----------|

1904—City Book 9, Bill 1000—Ewald Iron Co.

| | | | | | | | |
|----------------------------------|--|--|-----|-----|------|------|-------|
| Personal Property asses'd by do. | | | 500 | .85 | 2.75 | 7.35 | 10.95 |
|----------------------------------|--|--|-----|-----|------|------|-------|

1905—City Book 15, Bill 1586—L. Phillip Ewald.

| | | | | | | | |
|--------|-------------|-----------------|--------|--------|---------|---------|-----------|
| 67 | 3rd | 61 ⁶ | 22,950 | | | | |
| 67 | 3rd | 39 11/12 | 14,490 | | | | |
| 3926 | Westminster | 50 | 14,750 | | | | |
| Totals | | | 52,190 | 88,723 | 287,045 | 767,193 | 1,142,961 |

201 1906—City Book 15, Bill 1578—L. Phillip Ewald.

| City blk. | Street. | Front ft. | Valuation. | State. | School. | City. | Total. |
|-----------|-------------|-----------------|------------|--------|---------|---------|----------|
| 67 | 3rd | 61 ⁶ | 22,950 | | | | |
| 67 | 3rd | 39 11/12 | 14,490 | | | | |
| 3926 | Westminster | 50 | 14,500 | | | | |
| Totals | | | 51,940 | 88,298 | 285,67 | 716,772 | 1,090,74 |

1906—City Book 15, Bill 1579—Louis Phillip Ewald.

| | | | | | | | |
|-----|------|----------|--------|--------|--------|---------|----------|
| 101 | Pine | 39 11/12 | 51,160 | 86,972 | 281,38 | 793,008 | 1,074,36 |
|-----|------|----------|--------|--------|--------|---------|----------|

1906—City Book 9, Bill 1196—Ewald Iron Co.

| | | | | | | |
|----------------------|--|-----|------|-------|------|------|
| Returned to Assessor | | 450 | .765 | 2,475 | 6.21 | 9.45 |
|----------------------|--|-----|------|-------|------|------|

1907—City Book 16, Bill 1662—L. Phillip Ewald.

| | | | | | | | |
|--------|--------|-----------------|--------|--------|--------|--------|----------|
| 67 | 3rd | 61 ⁶ | 22,950 | | | | |
| 67 | do. | 39 11/12 | 14,490 | | | | |
| 3926 | Westm. | 50 | 12,500 | | | | |
| Totals | | | 49,940 | 84,898 | 274,67 | 724.13 | 1,083.68 |

1907—City Book 16, Bill 1533—Louis Phillip Ewald.

| | | | | | | | |
|-----|------|----------|--------|--------|--------|--------|-----------|
| 101 | Pine | 39 11/12 | 51,160 | 86,972 | 281,38 | 741.82 | 1,110,172 |
|-----|------|----------|--------|--------|--------|--------|-----------|

No assessment found for Ewald Iron Co.
 1908 " " " "

1908—City Book 16, Bill 1678—L. Phillip Ewald.

| | | | | | | | |
|------|-------------|-----------------|--------|-------|--------|--------|-----------|
| 67 | 3rd | 61 ^e | 22,950 | | | | |
| 67 | do | 39 11/12 | 14,490 | | | | |
| 3923 | Westminster | 50 | 12,500 | | | | |
| | Totals | ..... | 49,940 | 84898 | 299.64 | 724.13 | 1,108,638 |

202 1908—City Book 16, Bill 1679—Louis Phillip Ewald.

| City blk. | Street. | Front ft. | Valuation. | State. | School. | City. | Total. |
|-----------|---------|-----------|------------|--------|---------|--------|-----------|
| 101 | Pine | 39 11/12 | 51,160 | 86,972 | 306.96 | 741.82 | 1,135,752 |

1905—City Book 15, Bill 1587—Louis Phillip Ewald.

| | | | | | | | |
|-----|------|----------|--------|--------|--------|---------|-----------|
| 101 | Pine | 39 11/12 | 47,960 | 81,532 | 263.78 | 705.012 | 1,050,384 |
|-----|------|----------|--------|--------|--------|---------|-----------|

1905—City Book 9, Bill 1167—Ewald Iron Co.

| | | | | | | | |
|-------------------|-----|-----|------|------|-------|--|--|
| Personal Property | 500 | .85 | 2.75 | 7.35 | 10.95 | | |
|-------------------|-----|-----|------|------|-------|--|--|

St. Louis, March 8, 1913.

WALTER B. DONNELL,
Deputy Assessor.

Subscribed and sworn to before me, this 8th day of March, 1913.
[SEAL.] ED. F. FITZWILLIAM,

Notary Public, City of St. Louis, Mo.

My term expires Sept. 2nd, 1914.

(Here follows tax return blank marked page 202 1/2.)

CHART

TOO

LARGE

FOR

FILMING

203 On the 11th day of June, 1913, the following Amended Answer and Counter-claim was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY (now Fidelity & Columbia Trust Company), Executor and Trustee under the will of L. P. Ewald, Deceased, Defendant.

Amended Answer and Counter-Claim.

The defendant, Columbia Trust Company, amends its answer herein and for amendment says it is now known as the Fidelity & Columbia Trust Company, and is a corporation created and existing under the laws of the Commonwealth of Kentucky, with power to act in any *fiduciary* capacity and especially as Executor and Trustee under wills or by appointment of the Courts.

It states that it is a consolidated corporation composed of the Fidelity Trust Company and the Columbia Trust Company, the defendant named in the petition herein, and as such consolidated corporation, succeeded to all the rights, liabilities and duties of said constituent corporations, including the right and duty of acting as Executor and Trustee under the will of L. P. Ewald, deceased and that it is now the appointed, qualified and acting Executor and Trustee of his will.

204 For further answer herein, defendant says that there has heretofore been filed a suit in the Lyon County Court, Lyon County, Kentucky, in which the Commonwealth of Kentucky on relation of E. C. Huntsman, Revenue Agent for the State at Large was plaintiff, and this defendant as Executor and Trustee under the will of L. P. Ewald, deceased, was defendant, wherein and whereby the Commonwealth of Kentucky sought to recover taxes for the years 1907 and 1908 against this defendant by reason of the fact that the Ewald Iron Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky and having its principal place of business in Lyon County, Kentucky, has failed to list for assessment in Lyon County, Kentucky, and pay taxes on certain property as of September 1, 1906, and as of September 1, 1907, respectively, said property being particularly \$1,512,135.56 on September 1, 1906, and \$1,742,135.56 on September 1, 1907, which said Ewald Iron Company had owned on said respective dates on permanent deposit in banks in St. Louis, Missouri, and on account of the further fact that this defendant's decedent, L. P. Ewald, owned nearly all of the stock of the Ewald Iron Company, and was the dominating factor in said company.

This defendant filed an answer to said suit showing that the only property which said Ewald Iron Company had omitted for assess-

ment as of September 1, 1906, and September 1, 1907, was the money heretofore referred to by it in its answer in this suit, which
205 said Ewald Iron Company had permanently on deposit in banks in the City of St. Louis to the credit of the St. Louis branch of the Ewald Iron Company.

Defendant says that in said cause a trial was had, and a judgment rendered against this defendant, as Executor and Trustee under the will of L. P. Ewald, holding it liable for the taxes sued on therein. Thereafter, said case was appealed to the Circuit Court of Lyon County, Kentucky, and a judgment entered against this defendant as Executor of the estate of L. P. Ewald, holding it liable for said tax. Defendant says that said judgment covers the same subject matter of this suit for the years 1907 and 1908, and that said judgment is still in full force and effect and has never been reversed or modified, and defendant pleads and relies upon said judgment as a bar to the claim asserted herein for taxes for the years 1907 and 1908.

2. Further answering herein, and for counterclaim against the plaintiff, City of Louisville, defendant says that L. P. Ewald died July 31, 1909, leaving a will appointing this defendant Executor and Trustee which was thereafter admitted to probate, and thereafter this defendant qualified as Executor and Trustee of his estate, and is now acting as such.

206 It says that on August 27, 1909, the purported retrospective assessment sued on herein for the years 1904 and 1905 was made by the then City Assessor of the City of Louisville, and that thereafter on November 26, 1909, accompanied by its counsel, it appeared before the Board of Equalization of the City of Louisville for the purpose of protesting against said assessment. Defendant states that at said time, and at and after the time of the second retrospective assessment sued on herein made on November 22, 1910, it knew of no property which L. P. Ewald its decedent, had omitted from assessment as of September 1st, 1903, 1904, 1905, 1906, or 1907, nor does it now know of any property which its decedent owned as of September 1, 1907, or omitted from assessment except as hereinafter set out.

It says that on November 26, when it, by its officer, appeared before the Board of Equalization of the City of Louisville, it attempted to ascertain from the assessor of the City of Louisville what property it was claimed L. P. Ewald had omitted from assessment for the years for which his estate had been retrospectively assessed, but the City Assessor of the City of Louisville, upon the advice of the then City Attorney, declined to state what property it was claimed by L. P. Ewald had omitted from assessment for the years named. This defendant explained to the Board of Equalization that it had no knowledge of any property owned by L. P. Ewald in Kentucky as
207 of September 1st, 1903, 1904, 1905, 1906, and 1907, and no claim was made at said time that any property other than money belonging to the Ewald Iron Company permanently on deposit in St. Louis was considered or contemplated by the Assessor in making said retrospective assessment. Defendant says, how-

ever, it did learn from the argument of the City Attorney before the said Board of Equalization that the City was attempting to, and had retrospectively assessed L. P. Ewald on account of the fact that the Ewald Iron Company had permanently on deposit in St. Louis, Missouri the following sums money, to-wit:

\$ 842,310.25 as of September 1, 1903

1,038,952.09 as of September 1, 1904

1,355,799.96 as of September 1, 1905

1,629,836.36 as of September 1, 1906

1,837,404.48 as of September 1, 1907;

on which it had not paid taxes in Kentucky, and it understood at said meeting, that the Board of Equalization's reason for sustaining the retrospective assesment made by the City Assessor was upon the theory that this omission on the part of the Ewald Iron Company to pay taxes in Kentucky upon these amounts made L. P. Ewald, its decedent, liable to assessment in the amounts of the tax bills sued on herein. This defendant says that subsequent to said hearing, the City Assessor, on November 22, 1910, retrospectively assessed this defendant as Executor and trustee under the will of L. P. Ewald for the years 1906, 1907, and 1908 in the amounts set out in the petition,

on account of the facts that developed at the hearing on November 26, 1909; that it was understood by this defendant

that said assessment was made against the estate of L. P. Ewald on account of the fact that the Ewald Iron Company had omitted from assessment in Kentucky the amounts permanently deposited in banks to the credit of the Ewald Iron Company in St. Louis, heretofore set out, and this defendant understanding and realizing that said amounts were on deposit in St. Louis, and that the Board of Equalization had already sustained said assessments concerning the same matter, for the two years previous, felt that its only remedy against said assessment was to test the legality of same in a court of equity.

Defendant states that not being familiar with the affairs of its decedent as of the 1st of September, 1903, 1904, 1905, 1906, and 1907, it was impossible for this defendant, upon any hearing before the Board of Equalization at the time, to show exactly what property L. P. Ewald had upon said respective dates, and notwithstanding the fact that its officer did not show that he knew of any property omitted from Assessment by L. P. Ewald on said dates, said assessments were confirmed by the Board of Equalization.

This defendant states that since all of said assessments were confirmed by the Board of Equalization, it has ascertained that its decedent, L. P. Ewald, had, for a number of years, owned certain real estate in St. Louis, on which he paid taxes, and also that for a number of years, he owned certain stock in the Helmbacher Forge
209 & Rolling Mill Company, and certain stock in the Granby Mining & Smelting Company, and some bonds and cash, which stock and bonds were bought by said L. P. Ewald in St. Louis, Missouri, held by him there, being deposited at his office in St. Louis, and found there upon his death. This defendant says it has no

knowledge, however, as to how much of said cash, stocks or bonds were owned by L. P. Ewald on September 1st, of either 1903, 1904, 1905, 1906, or 1907, or what was the value of said stocks and bonds upon said respective dates.

This defendant further says that upon the death of said L. P. Ewald, the St. Louis Union Trust Company qualified in the County of St. Louis, Missouri, as ancillary administrator of the estate of L. P. Ewald, deceased, and that all of said property came into the hands of said St. Louis Union Trust Company, and as this defendant is informed, was taxable in St. Louis, Missouri, and that none of said property had come into the hands of this defendant or had ever been in the State of Kentucky up to the time any of said retrospective assessments sued on herein were made, or any hearing had upon said retrospective assessments.

This defendant further states that it did not know, and did not have any reason to believe that said stock in the Granby Milling & Smelting Company, or in the Helmbacher Forge & Rolling Mill

210 Company, or any other property of any kind than the stock in the Ewald Iron Company or the money on deposit in St. Louis to the credit of the Ewald Iron Company was covered by the retrospective assessment, or any opportunity to show that the value of the Helmbacher Forge & Rolling Mill Company stock or the Granby Mining & Smelting Company stock was only a very small amount as compared with the amounts of the retrospective assessments against its decedent. It further says the values of said stocks were very small compared to the assessments sued on herein on September 1st, 1903, 1904, 1905, 1906 and 1907.

This defendant says that its decedent, L. P. Ewald, was in the iron business in St. Louis for a great many years, and doing business in Missouri with headquarters at St. Louis up to 1880 and thereafter; that in 1880 said Ewald commenced to do business in Lyon County, Kentucky, and purchased the Tennessee Rolling Mill; that thereupon, without changing the location of its St. Louis office, or in any manner interfering with same, in order to do business in Kentucky, a corporation was formed having its principal place of business in Lyon County; that it continued thereafter to do business as therefore, and all of the sales of said corporation were made from its St. Louis office, where it maintained a large force of men and kept its general books; that subsequently the mill in Lyon County was abandoned, and a new mill purchased in Louisville, Kentucky, but

211 no change was made in its Articles of Incorporation or in its St. Louis office, which was in point of fact, the principal office of said corporation, and thereafter, as theretofore, practically all of its sales were made through its St. Louis office, and at St. Louis office large sums of money accumulated from profits of said business done outside of Kentucky and through its St. Louis office, and this money deposited permanently in banks in St. Louis, Missouri, is the money which formed the basis of the assessment sued on herein.

This defendant says that the Ewald Iron Company, which is a Kentucky corporation, paid all its taxes on all its property in Kentucky, and that this defendant knows of no property that L. P.

Ewald owned in the State of Kentucky as of September 1st, 1903, 1904, 1905, 1906 and 1907, except his stock in the Ewald Iron Company—which was not taxable, and certain household furniture and other property which he listed for taxation during each of said periods; not has it ever been claimed by the City Assessor of the City of Louisville that any property was omitted from assessment than as referred to heretofore.

This defendant says that it is at all times ready and willing to pay any taxes owned by its decedent's estate, and that if any part of said above property is subject to assessment, it is ready and willing to pay same, but this defendant says that under the established law of this State, as evidenced by the decisions of the Court of Appeals of this State, and of the Supreme Court of the United States, none of the above referred to property was subject to taxation in this State.

Defendant further says that all of the property covered by the retrospective assessments forming the basis of the tax bills sued on herein was permanently on deposit outside of the State of Kentucky, or had acquired a situs outside of the State of Kentucky by reason of having been acquired outside, and permanently kept outside, of the State of Kentucky, and that none of said property had ever been located in Kentucky or acquired any situs therein, and that the taxing of said property of the estate of its decedent without due process of law, and in violation of the rights guaranteed it under the Constitution of the State of Kentucky and of the United States.

Wherefore, This defendant prays that the petition be dismissed; that its answer herein be taken as a counter-claim against the City of Louisville; that the City of Louisville be permanently enjoined from seeking to further collect from this defendant any of the tax bill sued on herein; it prays that said tax bills be cancelled, and that it recover of the City of Louisville its costs herein expended, and for all proper relief to which it may appear entitled.

GIBSON & CRAWFORD,

Attorneys for Defendant.

L. W. Botts, being duly sworn says that he is Vice President of the Fidelity & Columbia Trust Company, and the statements of the foregoing amended answer and counter claim are true as he verily believes.

L. W. BOTTS.

213 Subscribed and sworn to before me by L. W. Botts, this 10th day of June, 1913. My commission expires January 20, 1914.

[SEAL.]

E. H. BOTSON,

Notary Public, Jefferson Co., Ky.

June 10, 1913.

Notice of filing waived.

GEO. CARY TABB,

Of Counsel Plff.

On the 11th day of June, 1913, the following Amended Reply and Answer to Counter claim was filed in Court, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY (now Fidelity & Columbia Trust Co.),
Executor and Trustee under the will of L. P. Ewald, Deceased,
Defendant.

Amended Reply and Answer to Counter Claim.

Paragraph 1. For further reply to the third paragraph to the original answer herein, the plaintiff denies that at the hearing before the Board of Equalization, referred to, it was shown by the City Assessor or the City Attorney that the said retrospective assessment was based wholly on the fact that L. P. Ewald was on September 1, 1903, or September 1, 1904, the sole stockholder of the Ewald Iron Company.

214 Plaintiff denies all of the money, or personal property which was owned or held by said Ewald Iron Company on the first days of September, 1903 or 1904, was such, only, as it had accumulated in the regular and natural course of business; denies that the Ewald Iron Company never parted with the title, ownership or control of said money and personal property until after September 1, 1904.

Paragraph 2. For further reply to paragraphs twelve of the amended answer herein, the City denies that when the defendant was notified of the retrospective assessments made by the City Assessor of Louisville for the years 1906, 1907 and 1908; the defendant appeared before the Board of Equalization of said City within the time given to do so or at all, or protested against said assessments or any of them, or demanded to be informed as to what personal estate of L. P. Ewald was embraced in said assessments or any of them, or that it did at the same time or at — avow its ignorance of any personal estate of said Ewald which was omitted from assessment for either of the years 1906, 1907 and 1908, or that it denied that any such personal estate had been omitted for either of the years 1903, 1907 or 1908.

Plaintiff further denies that the City Assessor had no knowledge or information or any fact to justify him in making the retrospective assessments sued on herein for the years 1904, 1905, 1906, 1907 and 1908; denies that he based the same on rumor or suspicion; denies that the defendant asked that the City Assessor be called before the Board of Equalization, or be required to inform the defendant what personal estate of L. P. Ewald had been retrospectively assessed by him for the years 1906, 1907 or 1908; denies that the deputy of the City Assessor made the assessments

sued on herein or any of them; denies that he was called before the Board with reference to the retrospective assessments for the years 1905, 1907 or 1908 or that he declined or refused, under the advice or direction of the City Attorney, or at all to give information or make a statement concerning said retrospective assessments for the years 1906, 1907 or 1908.

Plaintiff denies that the defendant appealed to the Board of Equalization to require said deputy assessor, or any one to inform it what personal property of L. P. Ewald had been intended to be retrospectively assessed by said deputy for the years 1905, 1907 or 1908; denies that the Board arbitrarily refused, or refused at all so to do, or that it would not allow the defendant to ascertain, or that the defendant did not know what personal property was intended to be or was assessed for the years 1904, 1905, 1906, 1907 or 1908.

Plaintiff denies that the defendant's President was thereupon sworn or was sworn at all, or testified that he knew of no personal estate of said Ewald subject to taxation that had been omitted from assessment for either of the years 1906, 1907 or 1908; denies that it did not appear whether said Ewald Iron Company had the
216 money referred to by the defendant in said paragraph of said answer, or any of it on hand or on deposit at any assessing date previous to the date of said meeting before the Board of Equalization to-wit, November 26, 1909.

Paragraph 3. For reply to the third amended answer herein, and for answer to the counter-claim therein set up and to the first paragraph thereof, and without waiving any rights it may have under its demurrer thereto, the plaintiff denies that the alleged judgment of the Circuit Court of Lyon County, Kentucky, referred to therein, covers the same subject matter as this action for the years 1907 and 1908; denies that said alleged judgment is a bar to the claims asserted herein for taxes for the years 1907 and 1908.

Paragraph 4. For further reply to said third amended answer, and further answer to the counter-claim and to the first paragraph thereof, the plaintiff says that the alleged judgment of the Circuit Court of Lyon County, Kentucky, referred to therein, has been appealed by the defendant in this action to the Court of Appeals of Kentucky, and that said action is now pending before the Court of Appeals of Kentucky, and that the defendant in this action is seeking by said appeal to reverse said alleged judgment of the Circuit Court of Lyon County on the ground that Lyon County, Kentucky, was not and is not the situs of the property sought to be assessed in said action for taxation; the plaintiff says that the City of Louisville was not made a party and is in no wise a party to said action; says that Lyon County, Kentucky, was not and is not the situs for
217 the purpose of taxation, either of the property sought to be assessed by the alleged action in Lyon County, Kentucky, nor of the property sought to be assessed in this action by the City of Louisville; says that said alleged judgment of the Circuit Court of Lyon County, Kentucky, is void and in no wise a bar to the claims asserted herein by the City of Louisville for taxes for the years 1907 and 1908.

Paragraph 5. Without waiving its demurrer herein the City of Louisville for further reply to the second paragraph of the third amended answer, and for answer to the counter-claim therein set up by the defendant, denies that it has knowledge or information sufficient to form a belief whether at or after the time of the second retrospective assessment sued on herein made on November 22, 1910, defendant knew of no property which L. D. Ewald, its decedent, had omitted from assessment as of September 1, 1903, 1904, 1905, 1906, or 1907, or whether said defendant now knows of any property which its decedent owned as of September 1, 1907, or omitted from assessment, except as set up in said pleading.

The plaintiff denies that it has sufficient knowledge or information to form a belief as to whether the defendant explained to the Board of Equalization that it had no knowledge of any property owned by L. P. Ewald in Kentucky as of September 1, 1903, 1904, 1905, 1906, or 1907, or whether said defendant now knows of any property which its decedent owned as of September 1, 1907, or omitted from assessment, except as set up in said pleading.

218 The plaintiff denies that it has sufficient knowledge or information to form a belief as to whether the defendant explained to the Board of Equalization that it had no knowledge of any property owned by L. P. Ewald in Kentucky as of September 1, 1903, 1904, 1905, 1906, or 1907; denies that no claim was made at said time that any property other than money belonging to the Ewald Iron Company permanently on deposit in St. Louis was considered or contemplated by the Assessor in making said retrospective assessments.

Plaintiff denies that it has knowledge or information sufficient to form a belief whether defendant learned from the argument of the City Attorney, before the said Board of Equalization, that the city was attempting to or had retrospectively assessed L. P. Ewald on account of the fact that the Ewald Iron Company had permanently on deposit in St. Louis, Missouri, the following sums of money or any of them:

\$ 842,310.25 as of September 1, 1903;
1,038,952.09 as of September 1, 1904;
1,355,799.96 as of September 1, 1905;
1,629,838.36 as of September 1, 1906;
1,837,404.48 as of September 1, 1907;

on which it had taxes in Kentucky, or whether it understood at said meeting that the Board of Equalization's reason for sustaining the retrospective assessments made by the City Assessor, was upon the theory that this omission on the part of the Ewald Iron Company to pay taxes in Kentucky upon these amounts made L. P. Ewald, its decedent, liable to assessments in the amounts of the tax bills sued

on herein, or whether it was understood by defendant that
219 said assessment was for the years 1906, 1907, or 1908, was subsequently made against the estate of L. P. Ewald on account of the fact that the Ewald Iron Company had omitted from

assessment in Kentucky the amounts permanently deposited in banks to the credit of Ewald Iron Company in St. Louis set out in said pleading; or whether defendant understood or realized that said amounts were on deposit in St. Louis, or that the Board of Equalization had already sustained said assessments concerning the same matter for the two previous years; or whether it felt that its only remedy against said assessment was to test the legality of same in a court of equity.

Plaintiff further states that it is without knowledge or information sufficient to form a belief as to whether defendant was not familiar with the affairs of its decedent as of the first day of September, 1903, 1904, 1905, 1906, or 1907; or whether it was impossible for the defendant, upon any hearing before the Board of Equalization at the time or any other time, to show exactly what property L. P. Ewald had upon said respective dates; and plaintiff denies that its officer did not show that he knew of any other property omitted by L. P. Ewald on that date.

Plaintiff further denies it has knowledge sufficient to form a belief as to whether defendant has any knowledge as to how much cash, stock or bonds, referred to in the pleading, were owned by L. P. Ewald, on September 1st, of either 1903, 1904, 1905, 1906, or 1907; or what was the value of said stocks or bonds or any of them upon any respective dates, or any of them.

220 Plaintiff further denies that all or any of the property which came into the hands of the St. Louis Trust Company, as ancillary administrator of the estate of L. P. Ewald, deceased, was taxable in St. Louis, Missouri, or that none of said property had come into the hands of the defendant, or had ever been in the State of Kentucky up to the time any of the said retrospective assessments sued on herein were made, or any hearing had upon any said retrospective assessments.

Plaintiff denies it has knowledge sufficient to form a belief as to whether defendant did not know, or did not have any reason to believe that said stock in the Granby Mining & Smelting Company, or in the Helmbacher Forge & Rolling Mill Company, or any other property or any kind than the stock in the Ewald Iron Company, or the money on deposit in St. Louis to the credit of the Ewald Iron Company was covered by retrospective assessment, and plaintiff alleges that the defendant did have an opportunity to show that the value of the Helmbacher Forge & Rolling Mill Company stock, and the Granby Mining & Smelting Company stock was a small amount as compared with the amounts of the retrospective assessments against its decedent. Plaintiff denies that the value of said stocks was very small compared with the assessments sued on herein on September 1, 1903, 1904, 1905, 1906, and 1907.

221 Plaintiff denies that when defendant's decedent, L. P. Ewald, commenced to do business in Lyon County, Kentucky, in 1880, that thereupon it did not change the location of its St. Louis office, or that it did not interfere with same in any manner, or that it continued thereafter to do business as theretofore, or that all or any of the sales of said corporations were made from

its St. Louis office, or that it maintained a large force of men or keep its general books in St. Louis; denies that it when the new mill was purchased in Louisville, Kentucky, no change was made in the St. Louis office; that said office was in point of fact or at all the principal office of said corporation, or that thereafter practically all or any considerable number of its sales were made through its St. Louis office, or that at the St. Louis office large or any sums of money were accumulated from profits of said business done outside of Kentucky, or through its St. Louis office, or that said money was deposited permanently in banks in St. Louis, or that said money is the money which formed the basis of the assessments sued on therein.

Plaintiff denies that the Ewald Iron Company paid all its taxes on all its property in Kentucky, or on any of the property sought to be assessed herein, or that the defendant knows of no property that L. P. Ewald owned in the State of Kentucky as of September 1, 1903, 1904, 1905, 1906, or 1907, except his stock in the Ewald
222 Iron Company, certain household furniture and other property which he listed for taxation in each of said periods; denies that his stock in the Ewald Iron Company was not taxable in Kentucky; says that it has been claimed by the City Assessor of the City of Louisville that other property was omitted from assessed than as referred to by the defendant; denies that under the established law of this State as evidenced by the decision of the Court of Appeals of this State, or of the Supreme Court of the United States, none of the property referred to in said pleading was subject to taxation in this State, and plaintiff says that by the established law of this State all of the property sought to be assessed herein is subject to assessment for taxation in the State of Kentucky, and by the City of Louisville.

Plaintiff denies that all or any of the property covered by the retrospective assessments, forming the basis of the tax bills sued on herein, was permanently on deposit outside of the State of Kentucky, or on deposit at all, or had acquired a situs outside of the State of Kentucky by reason of having been acquired outside or being permanently kept outside of the State of Kentucky, or for any reason; and plaintiff alleges that all of said property sought to be taxes herein was located in Kentucky and acquired a situs therein as of the dates of the respective assessments herein; denies that the taxing of said property or any part thereof by the State of Kentucky would be the taking of the property of the estate of the defendant's decedent without due process of law, or any violation
223 of the rights guaranteed it under the Constitution of the State of Kentucky, and of the United States.

Wherefore, plaintiff prays that the counter claim asserted herein be dismissed and prays as heretofore, and for all proper and equitable relief.

GEO. CARY TABB,
STUART CHECALIER,
Attorneys for Plaintiff.

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O. Head states that he is Mayor of the City of Louisville, and that the foregoing answer and reply are true.

W. O. HEAD,
Mayor of City of Louisville, Ky.

scribed and sworn to before me by W. O. Head, this 11th of June, 1913. My commission expires February 17, 1914.

GEO. CARY TABB,
Notary Public Jeff. Co., Ky.

ice of filing waived.

GIBSON & CRAWFORD,
Att'ys, Defts.

Court held on the 25th day of June, 1913.

the plaintiff, by counsel, and filed a second Amended Reply answer to Counter Claim herein.

es parties hereto, by counsel, and files Agreed Stipulation of herein.

es plaintiff, by counsel, and files Exhibits "A" "B" "C" "D" herein.

agreement filed, it is agreed between the parties that no objection is made to the filing of the above exhibits in the manner and form produced, but that each and every of said exhibits are objected to by the defendant on the ground of relevancy competency.

motion of parties hereto, by counsel, it is ordered by the Court is action be and the same is hereby submitted.

Second Amended Reply and Answer to Counter-Claim filed 25th day of June, 1913, is as follows, to-wit:

erson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST Co., Etc., Defendants.

Second Amended Reply and Answer to Counter Claim.

es the plaintiff, the City of Louisville, and withdraws the ng allegations from paragraph four of its amended reply and to counter-claim:

the ground that Lyon County, Kentucky, was not and is e situs of the property sought to be assessed in said action for n."

plaintiff alleges, in lieu of said statement, that defendant

is seeking by said appeal to reverse said alleged judgment of the Circuit Court of Lyon County "on the ground that said judgment is void because the proceeding was not first
225 instituted against the Ewald Iron Company before it was sought to assess the stock of L. P. Ewald therein; and defendant contends in said action that as between Lyon County and Jefferson County, Lyon County is the proper situs for the purpose of taxation of the property involved in said action."

Wherefore, plaintiff prays as heretofore.

GEO. CARY TABB,
STUART CHEVALIER,
Attorneys for Plaintiff.

6/24/13.

Notice waived.

GIBSON & CRAWFORD,
Att'ys, Defts.

Said Agreed Stipulation of Facts filed on the 25th day of June, 1913, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Etc., Defendants.

(1) It is stipulated and agreed between the parties hereto and it is a fact that another notice of retrospective assessments of the estate of L. P. Ewald for the years 1906, 1907 and 1908, which
226 retrospective assessments are sued on herein, was mailed as required by law to the Executor of the estate on November 22, 1910, and that tax bills thereon were issued January 4, 1911.

(2.) It is further stipulated that in the deposition of L. W. Botts, Vice President of the defendant herein, at answer 85 et seq. It was erroneously stated that no money was received by the Executor from the sale of the stock of the Helmbacher Forge & Rolling Mill Company after Mr. Ewald's death. The fact is, and it is stipulated to be true, that the Executor did receive the proceeds of said sale on the 24th day of May, 1911. Said correction is made at the request of L. W. Botts.

(3.) It is further stipulated that A. F. Arbuckle would testify that the certificates of deposit mentioned in his testimony secured by the Ewald Iron Company on account of the deposits in St. Louis banks, were at all times in the office of the Ewald Iron Company, at St. Louis, Missouri, and this stipulation may be read as evidence, as if included in his deposition.

(4.) It is further stipulated between the parties hereto that immediately following the taking of the deposition of L. W. Botts,

to-wit: on June 9, 1913, the defendant wrote to the St. Louis Union Trust Company for the information referred to in question 81, but that up to this date no answer has been received, and further that the case is set down for argument upon request 227 of the City Attorney, without waiting for this information,

GEO. CARY TABB,
STUART CHEVALIER,
Attorneys for Plaintiff.
GIBSON & CRAWFORD,
Attorneys for Defendant.

Said agreement filed on the 25th day of June, 1913 is as follows to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

v.

COLUMBIA TRUST COMPANY, Etc., Defendant.

The plaintiff, City of Louisville, offers in evidence the following exhibits:

Exhibits A. Statement of U. S. King, Clerk Lyon County Court showing property listed by the Ewald Iron Company in Lyon County for taxation for the years 1904, 1905, 1906, 1907 and 1908, as shown by the tax bills of the County Assessor of Lyon County, and showing the action of the Board of Supervisors and the County Court thereon.

Exhibits B and C. Two certified copies of judgments of 228 Lyon County Court marked respectively "Exhibits B and C" attached hereto, the same being two of the judgments referred to in the pleadings.

Exhibit D. Being the first and second annual settlements of the St. Louis Union Trust Company, as ancillary administrator, C. T. A. of the estate of L. P. Ewald, deceased.

Exhibit E. Being copy of the judgment of the Lyon Circuit Court in the case referred to in an amended answer covering the years 1907 and 1908.

It is agreed between the parties that no objection is made to the filing of the above exhibits in the manner and form produced, but that each and every one of said exhibits are objected to by the defendant Columbia Trust Company on the ground of relevancy and competency.

GEO. CARY TABB,
STUART CHEVALIER,
Attorneys for Plaintiff.
GIBSON & CRAWFORD,
Attorneys for Defendants.

"EXHIBIT A."

Said "Exhibit A" filed with the foregoing Agreed Stipulation on the 25th day of June, 1913, is as follows to-wit:

STATE OF KENTUCKY,

Lyon County Court,

Office of the County Court Clerk:

This certifies that I have examined the records now on
229 file in my office pertaining to the assessment of property
for taxation of the Ewald Iron Company for the years 1904-
1905, 1906, 1907 and 1908, and find that said company listed with
the assessor for purpose of taxation for each of said years 5.700
acres of land situated in said county, at the taxable value fixed
by assessor and tax-payer, at time, as follows:

| | |
|-----------------|-----------|
| Year 1904 | 20,000.00 |
| 1905 | 20,000.00 |
| 1906 | 20,000.00 |
| 1907 | 20,000.00 |
| 1908 | 25,000.00 |

I further find, that the Board of supervisors of tax of said county in the years 1904 and 1905, increased the taxable value of said land to 30,000.; that in each instance the said company took an appeal to the county court and was heard on March 10, 1904, and the second appeal Feb'y. 11, 1905, when judgments were duly entered in each case, reducing the assessment fixed and made by the board of supervisors, to \$2,000,000; that the assessments continued through the five years set out at uniform valuation of \$20,000.00 except 1908 when the parties seem to have fixed said value at \$25,000.00. There appears but one item of property listed during each and all of those years, to-wit: 5.700 acres of land.

I further certify that the tax schedules returned by the
230 assessor for the years named, have been mislaid are not
now in my office, I take the above from the tax books made
out and returned by the assessor for those years.

Witness my hand at office in Eddyville, Ky., this March 7th,
1913.

U. S. KING,
Clerk Lyon County Court.

"EXHIBIT B"

Said "Exhibit B" filed with the foregoing Agreed Stipulation on the 25th day of June, 1913, is as follows to-wit:.

Friday, Oct. 12th, 1906.

At a Special Term of the County Court begun and held in and for Lyon County at the Court House in Eddyville, Ky.

Present Hon. W. L. Crumbaugh, Judge.

COMMONWEALTH OF KENTUCKY, &c.,

v.

EWALD IRON COMPANY.

This day came the defendant- by attorney and offered their answer herein which was ordered to be filed.

COMMONWEALTH OF KENTUCKY on Relation of J. F. Hanon,
Revenue Agent for State at Large, Plaintiff,

v.

EWALD IRON COMPANY, Defendant.

This cause having been heard and submitted upon the pleadings filed and the Court being sufficiently advised, it is hereby ordered and adjudged that the defendant Ewald Iron Company be now assessed on Omitted personal property for the purpose of taxation for state and county taxes, all the following amounts and for the following amounts and for the following years:

| | | | | | | | | | | |
|-----------|---------|-----|------|-----|------------|----|----|-------|-----|------|
| \$5000.00 | taxable | for | 1902 | and | assessable | as | of | Sept. | 15, | 1901 |
| "5000.00 | " | " | 1903 | " | " | " | " | " | 15, | 1902 |
| "5000.00 | " | " | 1904 | " | " | " | " | " | 15, | 1903 |
| "5000.00 | " | " | 1905 | " | " | " | " | " | 15, | 1904 |
| "5000.00 | " | " | 1906 | " | " | " | " | " | 15, | 1905 |

It is further ordered and adjudged that the said divers amounts before stated shall be taxable at the respective rates of taxation duly fixed for state and county purposes for the years aforesaid. That revenue agent J. F. Hawn be entitled to a penalty of 20 per cent on taxes so collected and further that the defendant pay the cost of proceeding.

Ordered that Court Adjourn till Court in Course.

W. L. CRUMBAUGH, J.L.C.C.

STATE OF KENTUCKY,
County of Lyon, Sct:

I, U. S. King, Clerk of the County Court for the County and State aforesaid, certify that the foregoing is a true and correct copy of the Court order as found in Order Book "G" on pages 434 and 465 in the Lyon County Court Clerk's Office.

Witness my hand this Jan. 21st, 1913.

232

U. S. KING,
Clerk of Lyon County Court.

"EXHIBIT C."

Said "Exhibit C" filed with the foregoing Agreed Stipulation on the 25th day of June, 1913, is as follows to-wit:

Orders of the Lyon County Court, Special Term, 13th day of August, 1909.

Present Hon. W. L. Crunbaugh, Judge.

COMMONWEALTH OF KENTUCKY by Arthur E. Hopkins, Revenue
Agent for State at Large, Plaintiff,

v.

EWALD IRON COMPANY, Defendant.

Judgment.

This cause coming on to be heard upon pleadings, Exhibits and proof and the Court being advised, orders and adjudges that the defendant, the said Ewald Iron Company, for the year 1907 upon an assessment made as of September 1st, 1906, omitted to list for assessment for taxation intangible personal property consisting of cash on deposit in Bank \$75,000.00 and accounts \$25,000.00, and this was all the intangible personal property omitted by said defendants for the year 1907.

233 That for the year 1908 upon an assessment made as of September 1st, 1907, the defendant omitted to list for assessment for taxation, intangible personal property consisting of cash on deposit in bank \$75,000.00, and accounts \$25,000.00 and this was all the intangible personal property shown to have been omitted by said defendants for the year 1908.

That for the year 1909 upon assessment made as of September 1st, 1908, the Defendant omitted to list for assessment for taxation intangible personal property consisting of cash on deposit in bank \$75,000.00 and accounts \$25,000.00 and this was all the intangible personal property omitted by said defendant for the year 1909.

The Clerk of this Court is ordered and directed to certify this judgment to the Auditor of this state and the sheriff of this County. The Sheriff is directed to collect said tax, cost and penalty as other

taxes are collected by him and to pay the penalty to M. J. Holt, attorney of record.

The County Attorney was present and assisted in the prosecution of this action.

W. L. CRUMBAUGH, *Judge.*

STATE OF KENTUCKY,

County of Lyon, Sct:

I, U. S. King, Clerk of the County Court for the County and State aforesaid, certify that the foregoing is a correct and true copy of the court order as found in Order Book "G" at page 591, in the Lyon County Court Clerk's Office.

U. S. KING, *Clerk.*

| | | |
|----------|--|----------|
| Dec. 1. | per share on 850 shares of stock..... | 1,275.00 |
| | " Interest at 3% per annum on daily balances of this account from Aug. 14, 1909, to date..... | 25.18 |
| Dec. 15. | " Franklin Bank, cash on deposit as per inventory, \$3,054.22 and accrued interest to date..... | 30.41 |
| " | " Boatmen's Bank, cash on deposit as per inventory, \$9,725.05 And accrued interest to date..... | 122.81 |
| " 22 | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 50 bonds due Nov. 1, 1897, at 6% — 50 coupons at \$3.00..... | 150.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 50 bonds due May 1, 1898, at 6% — 50 coupons at \$3.00..... | 150.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due Nov. 1, 1898—44 coupons at \$3.00..... | 132.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due May 1, 1899—44 cou- pons at \$3.00..... | 132.00 |
| 236 | | |
| Dec. 22. | To St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due Nov. 1, 1900, 44 coupons at \$3.00..... | 132.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due May 1, 1901, 44 coupons at \$3.00..... | 132.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due Nov. 1, 1901, 44 coupons at \$3.00..... | 132.00 |

| Date. | | No. of voucher. | Credit. | Debit. |
|----------|---|--------------------|---------|----------|
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due May 1, 1902, 44 coupons at \$3.00 ..... | .. | ..... | 132.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due Nov. 1, 1902, 44 coupons at \$3.00 ..... | .. | ..... | 132.00 |
| " | " St. Louis Exposition & Music Hall Association, payment of 6 months' interest on 44 bonds due May 1, 1903, 44 coupons at \$3.00 ..... | .. | ..... | 132.00 |
| | And interest on same bonds ..... | .. | ..... | 88.48 |
| | Bonds paid, \$4,400.00 ..... | .. | ..... |  |
| 237 | | | | |
| Dec. 22. | To Helmbacher Forge & Rolling Mills Co., extra dividend of \$2.00 per share on 850 shares ..... | .. | ..... | 1,700.00 |
| 1910. | | | | |
| Feb. 2. | " Helmbacher Forge & Rolling Mills Co., dividend of \$1.50 per share on 850 shares ..... | .. | ..... | 1,275.00 |
| Mch. 9. | " Granby Mining & Smelting Co., dividend of \$2.50 per share on 500 shares ..... | .. | ..... | 1,250.00 |
| May 4. | " Helmbacher Forge & Rolling Mills Co., dividend of \$3.50 per share on 850 shares ..... | .. | ..... | 2,975.00 |
| June 1. | " Interest at 3% per annum on daily balances of this account from Dec. 1, 1909, to date ..... | .. | ..... | 214.12 |
| Aug. 1. | " Helmbacher Forge & Rolling Mills Co., dividend of \$1.50 per share on 850 shares ..... | .. | ..... | 1,275.00 |
| Sept. 15 | " Granby Mining & Smelting Co., dividend of \$2.50 per share on 500 shares ..... | .. | ..... | 1,250.00 |

| | | | | | |
|----------|---|----|--|--------|--|
| 1909. | | | | | |
| Aug. 19. | By St. Louis Probate Court, cash paid for costs..... | 1 | | 16.25 | |
| " 21. | " A. F. Arbuckle, payment on account of services as watchman at 412-14 Pine St. for July, 1909..... | 2 | | 15.00 | |
| 238 | | | | | |
| Aug. 26. | By First National Bank of Belleville, Ill., payment account of obtaining information in re matters pertaining to estate.. | 3 | | 1.00 | |
| " 27 | " A. F. Arbuckle, payment of certified demand account of cutting grass at 3821 Westminster Place..... | 4 | | 2.50 | |
| Sep. 21 | " Western Union Telegraph Co. cash paid for telegram..... | 7 | | .51 | |
| Sep. 14. | " St. Louis Times, cash paid for publishing notice to creditors. | 5 | | 4.00 | |
| No. 17 | " American Storage & Moving Co., payment of storage on household goods, Aug. 1 to Nov. 1, 1909..... | 8 | | 121.00 | |
| " 26 | " American Storage & Moving Co., payment on 5th class claim, account of storage bill..... | 9 | | 96.00 | |
| Dec. 13 | " Edgar M. Davis & Co., payment of 5th class claim, account of insurance bill..... | 10 | | 23.80 | |
| " " | " Patrick Carroll, cash paid for fee as appraiser of personal property..... | 11 | | 5.00 | |
| " " | " J. E. Carroll, cash paid for fee as appraiser of personal property and witness to inventory..... | 12 | | 5.00 | |
| 239 | | | | | |
| Dec. 13 | By J. H. McManus, cash paid for fee as appraiser of personal property and witness to inventory..... | 13 | | 5.00 | |
| " 17 | " Chas. F. Joy, Recorder, cash paid for recording certified copy of will..... | .. | | 8.50 | |
| " " | " Columbia Trust Co., Trustee, delivery to it of the Goods and Chattels at their appraised value of..... | 14 | | 871.45 | |

| | | | | | |
|------|-------|----|---|----|---------------------|
| " | 22 | " | Edmond Koeln, Collector, payment of 1909 real estate taxes. | 15 | 2,200.02 |
| " | " | " | Edmond Koeln, Collector, payment of 1909 sprinkling taxes | 16 | 10.32 |
| | 1910. | | | | |
| Jan. | 26 | By | American Storage & Moving Co., payment account of un- | 17 | |
| | | | packing and repacking household goods for shipment.. | 18 | 142.76 |
| Feb. | 19. | " | A. F. Brannigan, Notary, cash paid for affidavit of appraisers | 19 | 1.50 |
| Feb. | 19. | " | A. F. Brannigan, Notary, cash paid for affidavit to inventory | 20 | .50 |
| Mch. | 11. | " | Wagoner Undertaking Co., payment of first class claim, amount of funeral bill..... | 21 | 103.50 |
| Apr. | 23 | " | A. F. Brannigan, Notary, cash paid -or affidavit to appeal in re tax assessment..... | 22 | .50 |
| May | 26. | By | St. Louis Probate Court, cash paid for costs..... | | 25.00 |
| | 240 | | | | |
| " | " | " | St. Louis Union Trust Co., payment account of commissions on 1st annual settlement..... | | 10,000.00 |
| Sep. | 2. | " | Edmond Koeln, Collector, payment of 1910 personal taxes. | | 18.99 |
| " | 30. | " | Balance | | 164,853.62 |
| | | | | | <u>\$178,542.72</u> |
| | | | | | <u>\$178,542.72</u> |

Which balance consists of:

Real Estate as per Inventory:

| | |
|--|-------------|
| #412 and #414 Pine Street, St. Louis, Mo. | |
| #708-10-12-14 and 16 North Third Street, St. Louis, Mo. | |
| #3821 Westminster Place, St. Louis, Mo. | |
| 425 shares Helmbacher Forge & Rolling Mills Co. at \$100.00 per share, as per inventory | \$42,500.00 |
| 425 shares Helmbacher Forge & Rolling Mills Co. at \$100.00 per share, as per this settlement | 42,500.00 |
| 900 shares Granite-Bi-Metallic Consolidated Mining Co. at \$100.00 per share, as per inventory | 9,000.00 |
| 500 shares Granby Mining & Smelting Co. at \$100.00 per share, as per inventory | 50,000.00 |

Stocks, as per inventory, supposed to be worthless:

| | |
|--|------------|
| 2,000 shares Louisiana Exposition Co. at \$1.00 per share | \$2,000.00 |
| 5 shares St. Louis Exposition & Music Hall association at \$25.00 per share. | \$125.00 |

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| | | |
|--|------------|---------------------|
| 50 shares of the Sempire Clock Co. of the par value of \$100.00 per share .. | \$5,000.00 | |
| Trust Certificate of Chas. Chatlin Allen, Secretary of the Tierra Seca Mining Co. of East St. Louis, Ill., for 100 shares of the capital stock of said company of the par value of \$10.00 per share | \$1,000.00 | 20,853.62 |
| | | <u>\$164,853.62</u> |

STATE OF MISSOURI,

City of St. Louis, ss:

F. X. Ryan, being duly sworn, on his oath says, that he is the Ass't Trust Officer of the St. Louis Union Trust Company, Ancillary Administrator c. t. a. of estate of Louis Philip Ewald, deceased, and that the foregoing is a just, full and perfect account, settlement and statement of all things therein contained, and of all moneys and effects received and paid out by said Administratrix for and on ac-

130 FIDELITY & COLUMBIA TRUST CO., EXECUTOR, &C., VS.

242 count of said estate and said deceased from the time of its
appointment to the date of its settlement.

F. X. RYAN.

Sworn to and subscribed before me, this 14 day of October, 1910.
My Commission expires February 10th, 1911.

[SEAL.]

A. F. BRANNIGAN,
Notary Public.

Am. Sett. App'd.

C. W. H.

In the Probate Court of the City of St. Louis, Missouri, September Term, 1911.

Second Annual Settlement of the St. Louis Union Trust Company, Ancillary Administrator c. t. a., of the Estate of Louis Philip Ewald, Deceased.

| Date. | | No. of voucher. | Credit. | Debit. |
|-----------|--|--------------------|---------|--------------|
| 1910. | | | | |
| Sept. 30. | To Balance in hands of Executor at first annual settlement | .. | | \$164,853.62 |
| Nov. 2. | " Helmbacher Forge & Rolling Mills Co. dividend \$1.50 per share on 850 shares | .. | | |
| Dec. 1. | " Interest at 3% per annum on daily balances of this account from June 1st, 1910, to date. | .. | | 1,275.00 |
| " 23. | " Helmbacher Forge & Rolling Mills Co. dividend \$2.00 per share on 850 shares | .. | | 246.87 |
| 243 | | .. | | 1,700.00 |
| 1911. | | | | |
| Feb. 2. | " Helmbacher Forge & Rolling Mills Co. dividend \$1.50 per share on 850 shares | .. | | 1,275.00 |
| Mch. 15. | To Granby Mining & Smelting Co. dividend \$2.50 per share on 500 shares | .. | | |
| May 2. | " Helmbacher Forge & Rolling Mills Co. dividend \$1.50 per share on 850 shares | .. | | 1,250.00 |
| June 1. | " Interest at 3% per annum on daily balances of this account from Dec. 1st, 1910, to date. | .. | | 1,275.00 |
| Sept. 8. | " Granby Mining & Milling Co. dividend \$2.50 per share on 500 shares | .. | | 171.44 |
| | | .. | | 1,250.00 |

| | | | |
|----------|--|----|---------------------|
| 1910. | | | |
| Oct. 28. | By A. F. Brannigan, Notary, cash paid for affidavit to first annual settlement | 23 | .50 |
| Dec. 23. | " St. Louis Union Trust Co., payment on account of commission on 2nd annual settlement | .. | 10,000.00 |
| 1911. | | | |
| Jan. 13. | By St. Louis Probate Court, cash paid for costs | 24 | 5.00 |
| 1911. | | | |
| Feb. 14. | " Columbia Trust Co. Louisville, Ky., Executor, payment on account of distribution | 25 | 7,500.00 |
| Apr. 10. | " R. E. & E. R. Rombauer, payment account legal services rendered, St. Louis Union Trust Co., Administrator c. t. a. and the Columbia Trust Co. of Louisville, Executor in Kentucky, of the estate of deceased | .. | .. |
| 244 | | | |
| Apr. 3. | " Columbia Trust Co. Executor, payment on account of distribution, 850 shares Helmbacher Forge & Rolling Mills Co. at \$100.00 per share | 27 | 85,000.00 |
| Sept. 2. | " Edmond Koeln, Collector, payment of 1911, Personal Taxes | 27 | 274.84 |
| " 5. | " St. Louis Times, cash paid for publishing notice of final settlement. | 28 | 5.25 |
| " 30. | " Balance in hands of executor | .. | 66,635.34 |
| | | | <u>\$173,296.93</u> |
| | | | <u>\$173,296.93</u> |

Which balance consists of:

Real Estate as per Inventory:

| | |
|--|----------|
| 412 & 414 Pine Street, St. Louis, Mo. | |
| 708-10-12-14 and 16 North Third Street, St. Louis, Mo. | |
| 3821 Westminster Place, St. Louis, Mo. | |
| 900 shares Granite-Bi-Metallic Consolidated Mining Co. at \$100.00 per share, as per Inventory | 9,000.00 |
| 500 shares Granby Mining & Smelting Co. at \$100.00 per share, as per Inventory | 5,000.00 |

Stocks, as per Inventory, supposed to be worthless:

| | |
|--|------------|
| 2,000 shares Louisiana Exposition Co. at \$1.00 per share | \$2,000.00 |
| 5 shares St. Louis Exposition & Music Hall Association at \$25.00 per share. | 125.00 |
| 50 shares of the Sempire Clock Co. of the par value of \$100.00 per share.. | 5,000.00 |

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| | |
|--|------------|
| Trust Certificate of Chas. Chaffin Allen, Secretary of the Tierra Seca Mining Co. of East St. Louis, Ill., for 100 shares of the capital stock of said company of the par value of \$10.00 per share | \$1,000.00 |
| Cash | 7,636.34 |

\$66,636.34

NOTE.—This settlement is filed as a Second annual settlement, in lieu of final settlement, because of suit now pending to set aside will of deceased.

STATE OF MISSOURI,

City of St. Louis, ss:

F. X. Ryan, being duly sworn, on his oath says, that he is the Asst. Trust Office- of the St. Louis Union Trust Company, Ancillary Administrator, c. t. a. of the estate of Louis Philip Ewald, deceased, and that the foregoing is a just, full and perfect account, settlement and statement of all things therein contained, and of all moneys and effects received and paid out by said Administrator for and on account of said estate and said deceased from the time of its first annual settlement to the date of this settlement.

F. X. RYAN.

246 Sworn to and subscribed before me, this 11th day of October, 1911. My commission expires February 8th, 1915.

[SEAL.]

A. F. BRANNIGAN,
Notary Public.

An. Sett. App'd.
C. W. H.

STATE OF MISSOURI,
City of St. Louis, set:

I, George Brand, Clerk of the Probate Court, within and for the City of St. Louis, in the State of Missouri, do hereby certify that the foregoing are true copies of First Annual Settlement filed October 17th, 1910, and Second Annual Settlement filed October 13th, 1911, in the matter of the estate of Louis Phillip Ewald, deceased, as fully as the same remain on file and appeal of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 14th day of May, A. D. 1913.

[SEAL.]

GEORGE BRAND,
Probate Clerk.

247 Said "Exhibit E" filed with the foregoing Agreed Stipulation on the 25th day of June, 1913, is as follows to-wit:

EXHIBIT E.

Lyon Circuit Court, August Term, Tenth Day, August 29th, 1912.

COMMONWEALTH OF KENTUCKY, by E. C. Huntsman, Revenue Agent, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor of L. P. Ewald, Etc., Defendants.

Judgment.

This cause coming on for trial and having been submitted to the Court upon the special demurrer filed by the Columbia Trust Company, Executor of L. P. Ewald, to the statement as amended herein, and the Court, being advised, it is ordered and adjudged that the said special demurrer be overruled to which the defendant, Columbia Trust Company Executor of L. P. Ewald, excepted; the general demurrer of said defendant Columbia Trust Company Executor of L. P. Ewald, heretofore filed herein having been by consent of parties submitted to the Court, and the Court being advised, it is ordered and adjudged that said general demurrer be overruled, to which the defendant Columbia Trust Company Executor excepted and declined to plead further. The general demurrer of the plaintiff Common-

wealth of Kentucky to the answer of the Defendant, The
 248 Ewald Iron Company, heretofore filed herein having by consent of parties been submitted to the Court, and the Court being advised, it is ordered and adjudged that said demurrer be overruled to which the plaintiff excepted and declined to plead further; therefore this cause was by consent submitted to the Court upon the pleadings, and the Court being advised, doth order and adjudge that this proceedings as to the Ewald Iron Company be and the same is dismissed and said defendant will recover its costs herein against E. C. Huntsman Revenue Agent, to which the Commonwealth of Kentucky excepts and prays an appeal to the Court of Appeals, which is granted.

It is further considered and adjudged by the Court that it was the duty of L. P. Ewald as the sole stockholder and distributee of the Ewald Iron Company to list his shares of stock in said Company for taxation in Lyon County for the years 1907, and 1908, because of the failure of said Company before its liquidation to list for taxation and pay taxes thereon in Lyon County the money on deposit and other tangible property described in the statement, or to have listed the money or property received belonging to said company received by him by virtue of the fact that he was the sole stockholder thereof, and it is therefore adjudged that the Columbia Trust Company as Executor of L. P. Ewald, deceased, be assessed as of the first day of September 1906, with omitted personal property, to-wit:

Cash to the amount of \$1,517,135.56, and as of the first day
 249 of September 1907, with omitted personal property to-wit:

Cash to the amount of \$1,735,061.13, the said two sums being found to be the value of the shares of stock of said Ewald in the Ewald Iron Company over and above the amount of the property of said Ewald Iron Company which was listed and assessed for taxation on the dates above mentioned for the years 1907 and 1908, and the Clerk of this Court is ordered to certify this assessment to the Clerk of the Lyon County Court and he to the Sheriff of Lyon County and the Auditor of the state of Kentucky for collection of taxes thereon.

It is further ordered and adjudged that E. C. Huntsman, Revenue Agent, who has prosecuted this proceeding, is entitled to a penalty of twenty (2-) per centum of the amount of taxes to be paid under the said assessments, which penalty is to be added to and collected as part of the tax bills rendered on said assessments.

It is further adjudged that the plaintiff recover of, Columbia Trust Company, Executor of L. P. Ewald its cost herein expended and may have execution therefor.

It is further adjudged that J. S. Hodges County Attorney of Lyon County, was present and assisted in the trial of this cause.

250 To all of which, Columbia Trust Company Executor of L. P. Ewald, excepts and prays an appeal to the Court of Appeals which is granted.

A Copy.

Attest:

C. ARMSTRONG, *Clerk.*

My fee for this copy \$9.00.

— — —, *Clerk.*

(No order controverting pleadings of record appears among the papers, nor is of record in this case, and therefore, the same cannot be copied into this record.)

On the 6th day of September, 1913, the following Opinion of the Court was filed, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Opinion.

251 This action was instituted on September 15th, 1910, by the City of Louisville against the Columbia Trust Company as Executor and Trustee of the estate of L. P. Ewald, seeking to recover judgment against the estate on a retrospective assessment made against the estate on a retrospective assessment made against the Columbia Trusts Company, Executor of L. P. Ewald, August 27th, 1909, for the years 1904 and 1905 on \$1,000,000 of personal property as of September 1, 1903, and 1904, respectively; also assessment made November 22nd, 1910, for the year 1906, as of September 1st, 1905, upon \$1,250,000.00; September 1st, 1907, as of September 1st, 1906, upon \$1,550,000.00, for the year 1908, as of September 1st, 1907, upon \$1,850,000.00. Subsequently by amendment it made claims for taxes due upon respective assessments for the years 1909 and 1910, but judgment was confessed upon these last assessments following the decisions of the Court of Appeals in 140 Ky. 692, and 142 Ky. 465. The property here sought to be taxes in the main is the same property which the Court of Appeals considered in the case above mentioned, Commonwealth by etc. vs. Ewald, supra; although there is a small amount of personalty which does not seem to have been known of when the other litigation was in progress, that is to say, shares of stock in foreign corporations and certain moneys held by L. P. Ewald on deposit. The chief
252 controversy is over the money on deposit in divers banks of the City of St. Louis in the name of the Ewald Iron Company. As to this money, aggregating more than a million dollars, on deposit in the City of St. Louis, it seems that it was the earnings of the Ewald Iron Company, of which corporation L. P. Ewald was the sole stockholder during all these years, and for some years prior thereto; and as to these funds he had absolute personal control of them; and while keeping them in the name of the Ewald Iron Company, treated them as his own, and had the right to do so. It is earnestly insisted on behalf of the City of Louisville that these funds were, therefore, his individual property to all intents and purposes, and that, there-

fore, under the decision of the Court of Appeals in the case of Ewald Iron Company vs. Commonwealth the situs of the property was in Louisville, Kentucky, and was, therefore, subject to assessment by the City of Louisville. While it is the believe of this Court that it was never the purpose of L. P. Ewald to extend the corporate existence of the Ewald Iron Company or to renew the charter thereof, but to continue business as his own private enterprise, using the corporation and its sale offices in St. Louis as a means to avoid taxation, nevertheless, the court of appeals in extending the opinion reported in 140 Kentucky used this language:

253 "In fixing two years as a reasonable time for a corporation to close up its business the Court followed the Statute regulating the settlement of the estates of deceased persons. The corporation expired for business purposes on November 5, 1905. The property held in its name, should be taxes in its name and as its property until November 5th, 1907, after that time it should be taxes in the name of L. P. Ewald and as his property. It is important in these tax matters that a definite rule be laid down that the parties many conform to it and avoid litigation, costs and penalty. The former opinion 140 Ky. 692, is extended, as above indicated."

In this extension of the opinion the court holds that a corporation, whether the stock is held by a number of persons, or by one individual, has two years after the expiration of its charter to settle up its business, and specifically lays down the rule that "the property held in its name should be taxes in its name and its property until November 5th, 1907." It would seem, therefore, that the funds on deposit in St. Louis banks which had been earned by the Ewald Iron Company and held in its name should have been assessed against the Ewald Iron Company for the years mentioned, to-wit: 1903, and 1907, inclusive.

254 The proof in this case show- that after the Ewald Iron Company had been incorporated and operated in Lyon County for a short space of time the mills in Lyon County were dismantled and abandoned and no business was thereafter conducted in Lyon County; that a rolling mill was established in Louisville, Kentucky, and practically all of the iron sold by the Ewald Iron Company was manufactured there. Ewald himself lived in Louisville and conducted the affairs of the business from the City of Louisville. The chief sales department was in St. Louis, Mo., and the money made by the business was deposited in banks in St. Louis. He was the only stockholder and the corporation was conducted for his benefit alone all of the years for which taxes are now claimed. Excepting nominally, the corporation had removed its business from Lyon County, to to the City of Louisville, and Louisville therefore, became the business and practical home of the corporation, and it may well be said that it acquired a legal domicile in Jefferson County.

The earnings of the corporation over and above sufficient money for its operating expenses, in other words, its surplus, actually belonged to L. P. Ewald, although remaining in the name of the corporation. If the corporation had kept up its compliment of officers

and had other stockholders, he was at liberty to do as he
255 pleased with these funds. As the sole owner of the corporation he was responsible for the conduct of its affairs. It was the duty of the corporation to return its property to the proper assessing authorities for assessment and taxation. L. P. Ewald was the corporation and failed to perform his duty to the corporation and to the public. The Court of Appeals of Kentucky in 142nd Ky. found that it was his purpose to avoid taxation and under the circumstances the Court is of the opinion that this conclusion is correct. The failure of the corporation to list its property for taxation was the failure of L. P. Ewald, and the failure of the corporation to so list its property rendered the holder of the stock liable for taxes upon his shares of stock. The shares of stock held in the corporation are assessable as property of the share holders, unless in conformity with Section 4085 Kentucky Statutes the corporation shall report "A full statement of the property of such corporation for taxation."

It is urged by the defendant, under the extended opinion of the Court of Appeals, 142nd Ky. that assessments for the years prior to 1907 should have been against the corporation because it was
256 allowed two years after the expiration of its charter to close up its business. My understanding of the opinion of the Court of Appeals is that it was the duty of the assessing officer to assess the corporation every year and until two years after the expiration of its charter, but I do not understand the opinion to mean that if the corporation had not been paying taxes, that its property should now escape taxation. The corporation went out of existence under the law on November 5th, 1907. The assessments were made against L. P. Ewald on August 27th, 1909, and November 2nd, 1910. These assessments were made after the corporation had ceased to exist under the law and under the opinion of the Court of Appeals. There could be no assessment against the corporation or in the name of the corporation, which had ceased to exist. The only assessment that could be made was against the holder of the stock and the owner of the property who had failed to perform his duty to the public. The record shows the amount of taxes paid by L. P. Ewald during these years upon personal property. For several years it is as small as \$600.00, and in no year exceeding \$1,000.00. The taxes paid by the Ewald Iron Company were trifling in proportion to the value of its property, and no injustice can be done to the estate of L. P. Ewald by requiring it to pay taxes which L. P. Ewald himself or the Ewald
Iron Company should have paid.

257 It is not clearly shown what personal property the assessor had in mind when the assessments were made, but the record discloses that L. P. Ewald was the owner of the capital stock of the Ewald Iron Company and that money not required by the Ewald Iron Company for its operating expenses, much in excess of the assessed value of the personal property owned by the corporation and upon which taxes have not been paid to State, County or City, L. P. Ewald's domicile is shown to have been in the City of Louisville.

He owned the capital stock as above suggested, which in this case certainly must have been of the value of the surplus of the corporation deposited in banks in St. Louis. For these reasons it seems to the Court that the plaintiff should recover upon the tax bills declared upon. Judgment in conformity with this opinion may be entered reserving exceptions for the defendant.

SAM'L B. KIRBY, *Judge*.

At a Court held on the 24th day of September, 1913.

258 This action coming on to be heard, having been submitted to the Court upon the pleadings, proof and exhibits, and the Court being sufficiently advised, it is considered and adjudged that the plaintiff, City of Louisville, recover of the defendant, the Columbia Trust Company (now Fidelity & Columbia Trust Company), Executor & Trustee under the will of L. P. Ewald, deceased, the following amounts, to-wit:

\$18,600, the face of tax bill No. 30277 for the year 1904, with interest on said amount at the rate of one-half of one per cent per month or fraction of a month from May 1, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$18,600, the face of tax bill No. 17137 for the year 1904, with interest on said amount at the rate of one-half of one cent per month or fraction of a month from May 1, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$22,500, the face of tax bill No. 8029 for the year 1906, with interest on said amount at the rate of one-half of one per cent per month or fraction of a month from May 1, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill.

259 \$27,900, the face of tax bill No. 26508 for the year 1907, with interest on said amount at the rate of one-half of one per cent per month or fraction of a month from May 1, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$32,375, the face of tax bill no. 26621 for the year 1908, with interest on said amount at the rate of one-half of one per cent per month or fraction of a month from May 1, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill.

It is further considered and adjudged that the plaintiff recover of said defendant, its costs herein for all of which it may have execution, to all of which the defendant objects and excepts and prays an appeal to the Court of Appeals which is hereby granted.

260 Opinion of the Court of Appeals rendered May 29, 1914, is as follows:

Court of Appeals of Kentucky.

May 29th, 1914.

L. P. EWALD'S EXECUTOR, Appellant,

vs.

CITY OF LOUISVILLE, Appellee.

Appeal from Jefferson Circuit Court (Chancery No. 2)

L. P. EWALD'S EXECUTOR, Appellant,

vs.

COMMONWEALTH OF KENTUCKY et al., Appellee.

Appeal from Lyon Circuit Court.

Opinion of the Court by Judge Turner, reversing:

These two cases have been considered by the Court together, and will be passed upon in one opinion.

The case from Jefferson county was one seeking to collect taxes on personal property of L. P. Ewald, deceased, for the years 1904 to 1908, inclusive, the property being large sums of money on deposit, in the city of St. Louis in the name of the Ewald Iron Company, of which Company L. P. Ewald was the sole stockholder.

The Lyon county case is a proceeding instituted by a revenue agent for the benefit of the State and Lyon county seeking to assess this same money for the years 1907 and 1908 upon the theory
261 that it was the property of the Ewald Iron Company during those years, and that inasmuch as Lyon county was designated as the chief place of business of the Ewald Iron Company this money was taxable there.

Neither the Commonwealth nor Lyon county was a party to the Jefferson county suit, nor was the City of Louisville a party to the Lyon county suit.

In the Lyon county suit on the pleadings as presented a judgment was entered assessing this large sum of money in the St. Louis banks in Lyon county, and in effect rendering a judgment against the Ewald estate for a large sum of money in favor of Lyon county and the Commonwealth.

In the Louisville suit against the Ewald estate it was contended by the defendant that the money was not assessable in the State of Kentucky at all, but that if it was assessable in Kentucky it was properly assessable in Lyon county. In that case a large volume of testimony was taken which showed that during all of those years L. P. Ewald was a resident of the City of Louisville, and while Lyon county had been designated in the articles of incorporation as its place of business, the Ewald Iron Company in truth and in fact had conducted its iron business in the City of Louisville exclusively

since the year of 1886, and the Jefferson Circuit Court entered a judgment against the Ewald estate assessing this same money for the years named.

So that we have before us for consideration two judgments of two different courts assessing the same property at two different places for the same years, and in neither of the cases was the plaintiff in the other case a party. Clearly Lyon county and the Commonwealth were not bound by the action of the Jefferson Circuit Court fixing the situs of this money in the City of Louisville for taxation, and clearly the City of Louisville is not bound by the action of the Lyon Circuit Court in fixing the taxable situs of the same money for the same years in Lyon county.

Manifestly this property was not taxable at both places, and if both judgments should be affirmed a great injustice would be done to the Ewald estate; if the Louisville judgment should be affirmed and the Lyon county judgment reversed it would be in effect fixing the taxable situs of this property in Louisville under the evidence taken in a case to which Lyon county and the Commonwealth were not parties; if the Lyon county judgment should be affirmed and the Jefferson county case reversed it would be in effect fixing the taxable situs of this money in Lyon county as against the City of Louisville, in an action to which it was not a party.

Under the state of these records as we find them it is impracticable, if not impossible, to pass upon these cases on their merits, and inasmuch as it is conceded that the City of Louisville was the home of L. P. Ewald during the years named and his executor has qualified there, we have deemed it proper to reverse both of these judgments, and direct that the Lyon county case be transferred to the Jefferson Circuit Court and there consolidated with the Jefferson county case, so that the issues between the parties may be made and determined in the proper way.

For the reasons given each of the judgments is reversed for further proceedings consistent herewith.

Gibson & Crawford, Louisville, Ky., Attorneys for Appellant.
J. P. Whittinghill, E. C. Huntsman, S. H. Hodges, E. H. James,
for Commonwealth and Lyon county.

Pendleton Beckley, George Cary Tabb and Stuart Chevalier, for Appellee, City of Louisville.

Said Mandate received from the Lyon Circuit Court and filed in the Jefferson Circuit Clerk's Office on the 16th day of September, 1914, is as follows, to-wit:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

May 29th, 1914.

L. P. EWALD, Ex'or, Appellant,
against

COMMONWEALTH OF K'Y, By Etc., Appellee.

Appeal from a Judgment of the Lyon Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded for further proceedings consistent with the opinion herein.

Which is ordered to be certified to said Court.

A copy.

Attest:

ROBERT L. GREENE, C. C. J.
By A. ADDAMS, D. C.

Issued July 4th, 1914.

265 Said Amended Statement received from Lyon County Court and filed in the Jefferson Circuit Clerk's Office, on the 16th day of September, 1914, is as follows, to-wit:

Lyon County Court.

COMMONWEALTH OF KENTUCKY and LYON COUNTY, by E. C. Huntsman, Revenue Agent for the State at Large, Plaintiffs,

vs.

COLUMBIA TRUST COMPANY, as Executor and Trustee of L. P. Ewald, as Sole Surviving Stockholder of the Ewald Iron Company, and Ewald Iron Company, Defendants.

Amended Statement.

The plaintiffs in the above action, by leave of Court, amended their statement, and in lieu thereof say that since the filing of the original statement herein, they have come into possession of additional facts that were not known to them at that time, as follows:

The plaintiffs, Commonwealth of Kentucky and County of Lyon, on the relation of E. C. Huntsman, Revenue Agent State at Large, state that said E. C. Huntsman was, on the — of —, 1909, duly

appointed Revenue Agent for the Commonwealth of Kentucky, State at Large, by the Auditor of Public Accounts for Kentucky; that he executed bond and duly qualified, and is now acting as such,

and by virtue of said office, brings this suit on behalf of the
266 Commonwealth of Kentucky and County of Lyon.

The plaintiffs further state that the Ewald Iron Company, defendant herein, was incorporated under the general laws of the Commonwealth of Kentucky under date of November 5, 1880, for a term of twenty-five years, with its principal office and place of business in Lyon County, Kentucky. A copy of its articles of incorporation is filed herewith as a part hereof, marked Exhibit "X".

The plaintiffs further state that said company actively conducted its business in Lyon County for a number of years, when, and prior to 1905, it removed its active place of business to the City of Louisville, and thereafter continued the same mainly at Louisville and St. Louis, retaining and holding extensive and valuable property in Lyon County.

Prior to November 5, 1905, when, by the Articles of Incorporation, the Ewald Iron Company expired by limitation, one L. P. Ewald became and continued to be the sole stockholder of said company. He resided in Louisville, Kentucky, continuously from and prior to 1900 until his death, and died there on the — day of July, 1909, having first made his will, which was, on August 4, 1909, duly probated in Jefferson County Court. The defendant, Columbia Trust Company of Louisville, was appointed Executor of said will, and duly qualified as such on said date, and has ever since been acting
in that capacity, and has in hand sufficient of the personal
267 property of said estate received out of the assets of said company to pay the taxes herein alleged omitted.

The business of the Ewald Iron Company was continued, in all respects, in its corporate name, and as if its corporate existence had continued until after September 1, 1909, when said company was formally dissolved and its affairs have since been practically wound up. There was, until then, no change of title to any of its properties, which were extensive and valuable, located in Lyon County, Jefferson County, and in St. Louis, Missouri. It continued to make contracts, incur debts, and, in fact, carry on a large and profitable business in exactly the same manner it had done before the expiration of its corporate existence, until after September 1, 1909.

On the 1st day of September, 1906, the Ewald Iron Company had on deposit in various banks in St. Louis, Missouri, the sum of \$1,517,135.56, and on September 1st, 1907, in said bank, the sum of \$1,735,061.13, which sums represented, and were, in fact, accumulated earnings and profits of said company which had never been distributed.

268 For more than one-half of this sum, certificates of deposit bearing interest were issue to the Ewald Iron Company, payable to it, and the balance was deposited as open accounts in the name of said company, bearing interest and payable only on the check of the Ewald Iron Company. The books of the Ewald Iron Company

show all of these deposits, and they were carried on the books as assets of said company on said dates.

On the — day of October, 1909, all of the deposits aforesaid were, by the banks holding the same, transferred and paid to the Treasurer of the Ewald Iron Company, and were afterwards disposed of by the Directors of said Company in liquidating its affairs, until which time there had been no change of title to any of said money from the Ewald Iron Company, practically all of said money being turned over by the Treasurer of said Ewald Iron Company to the defendant, Columbia Trust Company as Executor of the estate of said L. P. Ewald.

Plaintiffs further state that on September 1, 1906, and September 1, 1907, said Ewald Iron Company had in possession in Lyon County, and was the owner of scrap iron, old machinery and brass 269 worth at fair voluntary sale for cash \$5,000.00 on each of said dates.

Plaintiffs further state that by the terms of its charter, the principal place of business and domicile of said Ewald Iron Company was at Tennessee Rolling Works, in Lyon County, Kentucky, and that thereafter continuously during all of its existence, and on September 1, 1906, and September 1, 1907, its domicile and situs for taxation of the property hereinabove mentioned was at said place.

Plaintiffs further state that all of the aforesaid property was assessable in and for Lyon County for State and County taxes on the aforesaid dates as follows:

September 1, 1906—\$1,507,135.56 deposited in St. Louis banks to the credit of Ewald Iron Company; \$5,000.00 worth of old machinery, brass and scrap iron, the property of said company.

September 1, 1907—\$1,735,061.13 deposited in St. Louis banks to the credit of Ewald Iron Company, and \$5,000.00 worth of old machinery, brass and scrap iron, the property of said company.

Plaintiffs state that said property was assessable as of said dates against, and as the property of said Ewald Iron Company, but was wholly omitted from said or any assessment by it or by any person.

and is still omitted from any assessment to any assessing 270 officer as of said date for Lyon County.

Plaintiffs state that the above property constituted nine-tenths of the property of said company; that same was not assessed for taxation by L. P. Ewald or any person or company for taxation as of September 1, 1906, or September 1, 1907, in any place, but that the residue of said company's property was located and assessed as of said dates in Jefferson County, Lyon County and in St. Louis, Missouri.

Plaintiffs state that said L. P. Ewald, on said dates, was the owner of 1,750 shares, all of the capital stock of said company; that it was worth, at fair voluntary sale for cash, on September 1, 1906, \$1,512,135.56, and on September 1, 1907, \$1,742,135.56; that said stocks,

if assessable for taxation as of said dates, were not assessed for any taxes for any person or corporation to any assessing officer of this State, and are wholly omitted from taxation.

Plaintiffs state that the aforesaid property of the Ewald Iron Company should be assessed as of said dates, September 1, 1906, and September 1, 1907, in Lyon County, for State and County taxes, at the values aforesaid against the defendants, Ewald Iron Company and Columbia Trust Company as Executor of L. P. Ewald, as sole surviving stockholder of the Ewald Iron Company, or if said cash, scrap iron and brass be not so assessable, then that said stock in the Ewald Iron Company belonging to said L. P. Ewald should be assessed in said County for State and County taxes as of said dates at the values aforesaid against the defendant Columbia Trust Company as Executor of L. P. Ewald.

Wherefore plaintiffs pray for judgment against the defendants, Ewald Iron Company and Columbia Trust Company as Executor of the estate of L. P. Ewald, sole surviving stockholder of the Ewald Iron Company, fixing the value of the above property for taxation at the values aforesaid, and assessing same for taxation in Lyon County for State and County taxes at said value as of said dates, to-wit:

| | |
|--|----------------|
| September 1, 1906—Cash in Bank..... | \$1,507,135.56 |
| Scrap iron, brass and old machinery..... | 5,000.00 |
| September 1, 1907—Cash in bank..... | 1,735,061.13 |
| Scrap iron, brass and old machinery..... | 5,000.00 |

with twenty per cent penalty to the Revenue Agent; and that said assessment be certified to the Sheriff of Lyon County for collection, or, in the alternative, if the Court find that said property be not so assessable, that it fix its value and assess the aforesaid stock of L. P. Ewald, in the Ewald Iron Company in said County for State and County taxes against the defendant Columbia Trust Company as Executor of L. P. Ewald as follows:

| | |
|--|----------------|
| September 1, 1906—1,750 shares stock in Ewald Iron Co. worth | \$1,512,135.53 |
| September 1, 1907—1,750 shares stock in Ewald Iron Co. worth | \$1,742,061.13 |

for twenty per cent penalty to the Revenue Agent; and that said assessment be certified to the Sheriff of Lyon County for collection; for all costs and all proper relief.

COMMONWEALTH OF KENTUCKY,
LYON COUNTY.

On Relation of E. C. Huntsman, Revenue Agent for the State at Large.

J. P. WHITTINGHILL,
Attorney for Plaintiff.
J. S. HODGES,
County Attorney, Lyon County.

Said Judgment received from Lyon Circuit Court and filed in Jefferson Circuit Clerk's Office, on the 16th day of September, 1914, is as follows, to-wit:

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Lyon Circuit Court.

COMMONWEALTH OF KENTUCKY, by E. C. Huntsman, Revenue Agent, Plaintiff,

VS.

COLUMBIA TRUST COMPANY, Executor L. P. Ewald, Etc., Defendants.

Judgment.

This cause coming on for trial and having been submitted to the court upon the special demurrer filed by the Columbia Trust Company, Executor of L. P. Ewald, to the statement as amended herein, and the court being advised, it is ordered and adjudged that the special demurrer be overruled, to which the defendant, Columbia Trust Company, Executor, excepted; the general demurrer of said defendant Columbia Trust Company, Executor of L. P. Ewald, heretofore filed herein having been by conse-t of parties submitted to the court and the court being advised, it is ordered and adjudged that said general demurrer be overruled, to which the defendant Columbia Trust Company, Executor, excepted and declined to plead

274 further. The general demurrer of the plaintiff, Commonwealth of Kentucky, to the answer of the defendant, the Ewald Iron Company, heretofore filed herein, having by consent of parties been submitted to the court and the court being advised, it is ordered and adjudged that said demurrer be overruled, to which the plaintiff excepted and declined to plead further; thereupon, this cause was by consent submitted to the court upon the pleadings and the court being advised doth order and adjudge that this proceeding as to the Ewald Iron Company be and the same is dismissed, and said defendant will recover its costs herein against E. C. Huntsman, Revenue Agent, to which the Commonwealth of Kentucky excepts and prays an appeal to the Court of Appeals, which is granted.

It is further considered and adjudged by the court that it was the duty of L. P. Ewald, as the sole stockholder and distributee of the Ewald Iron Company, to list his shares of stock in said company for taxation in Lyon County for the years 1907 and 1908 because of the failure of said Company before its liquidation to list for taxation

and pay taxes therein in Lyon County the money on deposit
275 and other tangible property described in the statement, or to have listed the money or property received belonging to said Company received by him by virtue of the fact that he was the sole stockholder thereof; and it is therefore adjudged that the Columbia Trust Company, as Executor of L. P. Ewald, deceased, be assessed as of the first day of September, 1906, with omitted personal prop-

erty, to-wit: cash to the amount of \$1,517,135.56 and as of the first day of September, 1907, with omitted personal property to-wit: cash to the amount of \$1,735,061.13, the said two sums being found to be the value of the shares of stock of said Ewald in the Ewald Iron Company over and above the amount of the property of said Ewald Iron Company which was listed and assessed for taxation on the dates above mentioned for the years 1907 and 1908, and the clerk of this court is ordered to certify this assessment to the clerk of the Lyon County Court and he to the Sheriff of Lyon County and the Auditor of the State of Kentucky for collection of taxes thereon.

It is further ordered and adjudged that E. C. Huntsman, Revenue Agent, who has prosecuted this proceeding, is entitled to a penalty of twenty (20) per centum of the amount of taxes to be paid under the said assessments, which penalty is to be added to and collected as part of the tax bills rendered on said assessments.

It is further adjudged that the plaintiff recover of the Columbia Trust Company, Executor of L. P. Ewald, its costs herein expended and may have execution therefor.

It is further certified that J. S. Hodges, County Attorney of Lyon County, was present and assisted in the trial of this cause.

To all of which the Columbia Trust Company, Executor of L. P. Ewald, excepts, and prays an appeal to the Court of Appeals of Kentucky, which is granted.

Said Answer received from the Lyon County Court and filed in the Clerk's office on the 16th day of September, 1914, is as follows, to-wit:

Lyon County Court.

COMMONWEALTH OF KENTUCKY AND LYON COUNTY, by E. C. Huntsman, Revenue Agent State at Large, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor and as Trustee of L. P. Ewald, Sole Surviving Stockholder of the Ewald Iron Company, also the Ewald Iron Company, Defendants.

Answer.

277 The defendants, for answer herein say: It is not true that L. P. Ewald, on either September 1st, 1908, or September 1st, 1909, or his Executor on September 1st, 1910, owned or had in their possession or owned or had in the possession of either of them any personal property located in Lyon County or liable for assessment in said County; not true that they or either of them owned or possessed on the first day of September, 1906, any stock in the Ewald Iron Company, a domestic corporation paying no taxes in Kentucky, or any cash on hand, or any cash on deposit in banks, or any stock in the Helenbacher Iron Works of Saint Louis, or any accounts, or any

scrap iron, or any tools or machinery, and not true that any of the said items were worth the amounts alleged in the statement filed herein; nor on September 1st, 1907, the same property of the same value under the same conditions, the property of said Ewald Iron Company; nor on September 1st, 1908, any scrap iron or machinery the property of Louis P. Ewald; nor on September 1st, 1909, the same property, the property of Louis P. Ewald; nor on September 1st, 1910, the same property, the property of the Columbia Trust Company as Executor.

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Paragraph 11.

Further answering, defendants say that L. P. Ewald was, during all the years mentioned in the statement herein, and for many years prior thereto, a resident and citizen of Jefferson County, Kentucky, and that his Executor, the Columbia Trust Company, has its principal office in, and resides in Jefferson County, Kentucky, and were subject to assessment for taxation in said County alone on any personal property owned by them.

Wherefore having fully answered, defendants pray to be dismissed hence, with their costs herein expended, and for all proper relief.

JNO. GATES,

Attorney for Defendants.

Said Answer received from Lyon County Court, and filed in Clerk's Office on the 16th day of September, 1914, is as follows, to-wit:

Lyon County Court.

COMMONWEALTH OF KENTUCKY, by E. C. Huntsman, Revenue Agent, Plaintiff,

VS.

COLUMBIA TRUST COMPANY, Executor, Etc., Defendant.

Answer of Ewald Iron Company.

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The defendant, Ewald Iron Company, for answer herein says: It admits that it was, on the dates named in the petition, the owner of the money on deposit and tangible personal property named in the statement herein, and that the same was not listed for assessment or assessed for taxation in Lyon County for either of the years 1907 or 1908. It says that on the 1st day of September 1906 and 1907, it had an extensive branch store and plant in Saint Louis, Missouri, in which it had, for many years prior thereto, conducted an extensive and profitable business, and the said money on deposit in bank sought to be assessed herein was accumulated profits kept on hand and carried as assets of its said St. Louis branch, through which all of its business, except its manufacturing depart-

ment in Louisville, was conducted. None of said money was ever in the State of Kentucky at any time until October 1909.

It says that for the years 1906 and 1907, it was duly assessed for taxation in Lyon County and Jefferson County for State and paid the taxes thereon.

It further says that prior to the institution of this proceeding, it was dissolved, all of its property and assets have been disposed of, and the proceeds thereof distributed to the estate of L. P. Ewald, who was its sole stockholder, and whose estate should be required to pay all obligations of the defendant, including any taxes which should have been assessed against it.

Wherefore it prays to be dismissed.

JNO. GATES &
GIBSON, MARSHALL & GIBSON,
Attorneys for Ewald Iron Co.

Said General Demurrer received from Lyon County Court and filed in the Clerk's Office on the 16th day of September, 1914, is as follows, to-wit:

Lyon County Court.

COMMONWEALTH OF KENTUCKY, by E. C. Huntsman, Revenue Agent, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor of L. P. Ewald, Etc., Defendant.

General Demurrer of Columbia Trust Company, Executor of L. P. Ewald, to Statement.

The Columbia Trust Company, Executor of L. P. Ewald, demurs generally to the statement herein because it says the same does not state facts sufficient to create a cause of action against it, or to warrant the assessment in Lyon County, of any shares of stock of its testator, L. P. Ewald, in the Ewald Iron Company, by reason of the failure of said Company to list any of its property for assessment, or because the same was omitted from assessment in said County.

JNO. GATES,
GIBSON, MARSHALL & GIBSON,
Attorneys for Said Defendant.

* * * * *

At a Court held on the 12th day of October, 1914.

In pursuance of the mandate of the Court of Appeals, in these cases, it is hereby ordered that they be, and they are hereby consolidated and shall hereafter proceed as case No. 61955 and under

the style of City of Louisville vs. Fidelity & Columbia Trust Company, Executor of the estate of L. P. Ewald, deceased.

It is ordered that the answer of the City of Louisville, to the amended answer of the Commonwealth of Kentucky and Lyon Co. tendered herein Oct. 3, 1914, be and is permitted to be filed, which is done, to which the Commonwealth and Lyon County and the Fidelity & Columbia Trust Co. executor, etc. object and except.

It is further ordered that the evidence taken in the original action 61955 City of Louisville v. Fidelity and Columbia Trust Co. Executor etc. be read upon the hearing of this consolidated action with leave to the Commonwealth and Lyon County to cross-examine the witnesses whose depositions have been heretofore taken.

Then came the Commonwealth and Lyon County by counsel and tendered an amended statement and an answer to the petition and amended petition of the City of Louisville and upon their 289-333 motion to file said pleadings, to which the Fidelity and Columbia Trust Company, executor and the City of Louisville objected, this consolidated action is passed until Monday Oct. 19, 1914.

* * * * *

334 On the 2nd day of February, 1915, the following Depositions for plaintiff and Four (4) Exhibits were received from Lyon Circuit Court and filed in Clerk's Office to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

VS.

COLUMBIA & FIDELITY TRUST CO., Ex'o'r and Trustee of the Estate
of L. P. Ewald, Defendants.

Deposition for Plaintiff.

Depositions taken on behalf of plaintiff, pursuant to agreement at the office of Hodges & James, at Eddyville, Kentucky, this 30th day of January, 1915. Appearances, Hodges and James, Attorneys for Lyon County and Commonwealth of Kentucky, G. C. 335 Tabb, for the City of Louisville, and W. W. Crawford, for the defendant Columbia Trust Company.

Witness, C. W. CUNNINGHAM, first being duly sworn, deposes as follows:

Deposition of C. W. Cunningham, taken on behalf of the plaintiff, the City of Louisville, at the same time and place. Witness being first duly sworn, deposes as follows:

Q. 1. Please state your name, age.

A. C. W. Cunningham, is my name; age, 65 years old.

Q. 2. Where do you live.

A. Tennessee Rolling Works, 12 miles south of Eddyville.

Q. 3. How long have you lived there.

A. Been there all my life since I was 18 months old.

Q. 4. Were you there when Mr. Ewald bought out the Hillmans.

A. I was.

Q. 5. How long did he operate the mill.

A. Six years.

Q. 6. During that time did he live there.

A. Yes, certainly, made that his home.

Q. 7. Where did he sleep and eat.

A. He slept and eat in the house I am occupying now, run by his brother in law, Dr. Schaffer.

336 Q. 8. While the mill was operating there was there an office connected with it.

A. Why sure. There to be seen now.

Q. 9. How many men worked in the office.

A. Two, two clerks in there.

Q. 10. State whether or not orders were received there, and goods shipped from there.

A. Yes.

Q. 11. Where were they shipped to.

A. Different localities, no certain points.

Q. 12. Could — name a few places to which he shipped.

A. Nashville, Memphis, Tennessee, San Francisco, and other places bor- east and west.

Q. 13. When Mr. Ewald left in 1886, did he take any machinery with him.

A. Yes sir.

Q. 14. What machinery did he take.

A. All the best he had, and all that would be of any service to him, all that he needed at that time.

Q. 15. Was the machinery that he left onld and out of date.

A. Why sure.

Q. 16. Did Mr. Ewald ever come back after he left in 1886.

A. No, sir.

Q. 17. Has any one attempted to operate a mill there since he left.

A. No, sir. Not to operate.

337 Q. 18. Whom did he leave there besides you.

A. No one in the world, me individually. In 1889 I was left there. Caretaker of the Ewald property.

Q. 19. What happened between 1886 and 1889.

A. We were running that machinery there then.

Q. 20. When was it that they tore down the machinery.

A. It was the 8th day of April, 1886, that it was torn down, and loaded on barges.

Q. 21. From 1886 to 1889 there was no milling.

A. No sir, not a thing doing there.

Q. 22. How long have you been living in the old house on top of the hill where Dr. Schaffer lived when the mill was running.

A. Been there seven years.

Q. 23. Before you moved into that old house, who lived in it.

A. Nobody; the house was unoccupied. I used to go up there and let the air pass through it once or twice a week.

Q. 24. For how many years did you say there was nobody in the house.

A. I would say it was idle for ten years maybe longer; I kept no account of it; the doors were locked only when I unlocked them.

Q. 25. How many acres of ground is there in that place that can be cultivated, that has been cultivated.

A. I have about 300 acres under fence that is tillable land.

338 Q. 26. The rest of it is woodland is it not.

A. Yes, sir.

Q. 27. What has been your duty since Mr. Ewald left in 1886.

A. Mr. Toohey stayed there until 1889. In 1890 I was placed caretaker of the L. P. Ewald land and Mr. Ewald and Mr. Toohey looking after renting out those farms, and trying to keep the trespassers off that timber.

Q. 28. What has become of the houses in which the men used to live that worked at the mill.

A. Rotten, decayed, torn down and build into houses on other parts of the farm.

Q. 29. There was a shed over the entire works when Mr. Ewald left, I believe.

A. Yes, sir.

Q. 30. It just naturally rotten, and fell it, and I used it for burning plant beds, and the farmers that were cultivating land for me.

Q. 31. How long would you say that shed had been down.

A. 15 or 20 years.

Q. 32. Since that shed has been down, the machinery has just stood there, has it not.

A. Not altogether, a heap of it has been broke up and *took* away from there.

Q. 31. What was it broke up for.

A. To be utilized to make new iron out of it, was my instruction.

339 Q. 32. Was it any account as machinery.

A. No, sir.

Q. 33. Mr. Cunningham, I show you a photograph and ask you if you recognize that.

A. It is a turning lathe that stood in the yard.

Q. 34. Is that a good representation of it.

A. It is just like it stood till they broke it up.

Q. 35. How long has it stood there did you say without any shed or covering over it.

A. I don't know.

Q. 36. Has it stood that way since the shed fell.

A. That machinery stood there that way.

Q. 37. What is that a picture of that I hand you.

A. A picture of the crane that hoisted the coal out of the boat, and the stack. That is all wrecked and gone.

Q. 38. Would you say those stacks had been standing there bare and that machinery, as long as since 1890.

A. Yes, sir.

Q. 39. File that as part of your deposition and mark it "B".

A. I do.

Q. 40. What is that.

A. Those stacks there, and a shed over the furnace.

Q. 41. How long had those stacks been standing bare that way without any shed over it.

340 A. I couldn't say.

Q. 42. File that as exhibit "C".

A. I will.

Q. 43. What is that.

A. It is the machinery, the fly wheel.

Q. 44. How long has it been standing out in the weather.

A. 15 years or more.

Q. 45. File it as exhibit "D".

A. I will.

Q. 46. How many furniture is there in your house where you live now.

A. All of it in there belongs to me but one or two pieces, and I think M. A. Toohey made my wife a present of them.

Q. 47. When did Mr. Toohey leave, about.

A. In 1900.

Q. 48. Is there any ore in that land there.

A. No, sir.

Cross-examined by E. H. James:

Q. 1. Were you subpoenaed to come here and give your deposition in this case today.

A. I was asked to come here.

Q. 2. Were you subpoenaed by an officer.

A. No, sir.

Q. 3. At whose instance or request did you come.

A. This gentlemen (referring to Mr. Tabb) asked me — come.

341 Q. 4. I will ask you if when Mr. Ewald moved from the Tennessee Rolling Mill to Louisville, he left a house, a room furnished.

A. No, Ewald didn't. M. A. Toohey left it.

Q. 5. Wasn't this room known and called Mr. Ewald's room.

A. No, sir, Dr. Schaffer was proprietor of the house, and Mr. Ewald had boarded there.

Q. 6. Which room did Ewald occupy.

A. What was called the north room; I call it my parlor now—no, I am on the wrong end of the house, that room is on the south end of it.

Q. 7. What kind of furniture did it have in it.

A. A dresser, nice shape, good enough for anybody; two or three of chairs, I would call them steamboat chairs.

Q. 8. Many any beds.

A. Yes, sir, and a mattress, carpet on the floor, washstand.

Q. 9. Did any of Mr. Ewald's family come there after he left there, and stay at that house.

A. Dr. Schaffer came down there on a visit, but he didn't stay at the Ewald house. He stayed there two months.

Q. 10. Did either of Mr. Ewald's brothers or son stay there.

A. No, sir, not after the mill was running. Nobody but old man Toohey.

Q. 11. How long have you been living in that house.

A. I have been living there about seven years. I haven't kept any account of it. Ever since I burned up below.

342 Q. 12. What year was it that you were removing the mill and old iron to the river bank.

A. About three years ago this August.

Q. 13. I will ask you, Mr. Cunningham, if you were living in this house at that time.

A. No, I wasn't; but I don't know how long that has been.

Q. 14. Then you were mistaken when you have just said you lived in that house five to seven years.

A. I don't know how long. Ever since they wrecked that old machinery up there.

Q. 15. Why did you not live in this house before your house burned down.

A. Because my wife said it was too large for her, and she said she didn't want to go up there. I was authorized to go up there at first.

Q. 16. Isn't it a much more comfortable house than the place you lived in.

A. I should say it is.

Q. 17. Isn't it a fact that the reason you didn't live in this house was that it was kept for Mr. Ewald or some member of his family to live in.

A. No, sir, it was not.

Q. 18. How many rooms in the house that burned up.

A. Five, outside of the dining room and kitchen.

Q. 19. Was it not a box house.

343 A. No, sir, a log house, hewed logs, but the ell was box.
Q. 20. State whether or not you have been the only agent of Mr. Ewald in this county, and have resided on the property of the Ewald- in this county, and have resided on the property of the Tennessee River Rolling Works continuously from 1889 to a short time ago.

A. Yes, sir; in 1913 you made a little exchange up there.

Redirect,—Mr. Tabb:

Q. 1. The machinery that you spoke of putting on the bank about twelve years ago was old machinery when Mr. Ewald left.

A. Out of date, no use in the world.

Q. 2. It was put on the bank to be shipped to Louisville simply for scrap iron.

A. Yes, sir.

Q. 3. It has never even been shipped.

A. No, sir. It is down six or eight feet in the mud now.

Q. 4. That is when you moved into the big house.

A. About three or — years ago or whatever it may be.

Q. 5. Up until that time had anyone lived in the big house since Mr. Toohey left.

A. He left in 1889.

Recross:

Q. 1. These pictures about which you have testified, I will get you to state when they were taken.

344 A. I don't know when they were taken. I never saw them before in my life. They were taken when the machinery stood as taken.

Redirect:

Q. 1. I will get you to state whether those pictures are a fair representation of the condition that those old stacks and the old machinery that was left by Mr. Ewald has been in for the last 20 or 25 years.

A. Yes, sir.

Recross:

Q. 1. How do you know that when you do not know when the pictures were taken.

A. I know the machinery when I see it.

Redirect:

Q. 1. You have been there all of this time.

A. From beginning to ending.

Q. — You know how that machinery has looked, since Mr. Ewald left.

A. Yes.

Q. 3. And you base your answer on that as to how it looked.

A. Yes, sir.

C. W. CUNNINGHAM.

345 It is agreed by the parties hereto that the pictures to which Mr. Cunningham has testified were taken by Mr. Robert E. Catlett, about three years ago last summer, and that he would testify that said pictures are a fair representation of the scenes portrayed at that time. Mr. Catlett is of Eddyville, Ky.

Cross-examined by W. W. Crawford:

Q. 1. Mr. Cunningham, this house that you spoke of that Mr. Ewald occupied,—

A. There is a few a few pieces there that belonged to it, left there by Mr. Toohey.

Q. 2. I believe you said that you used to go up there two or three times a week and open up the house.

A. Yes, and would take a nap there.

Q. 3. Were you directed to keep it in shape.

A. I was, by them that owned it.

C. W. CUNNINGHAM.

STATE OF KENTUCKY,

Lyon County, Sct:

I, C. Armstrong, Clerk of the Lyon Circuit Court, do certify that the foregoing depositions of C. W. Cunningham was taken
346 before me at the time and place stated in the caption, that said witness was duly sworn before giving the same; that it was typewritten in my presence and in his presence, read to and subscribed to by him in my presence. Plaintiff was present by attorney G. C. Tabb, defendant, Columbia Trust Company, was present by attorney, W. W. Crawford; and Lyon County and Commonwealth of Kentucky, by J. S. Hodges, county attorney, and E. H. James.

Given under my hand this 30th day of January, 1915.

C. ARMSTRONG,

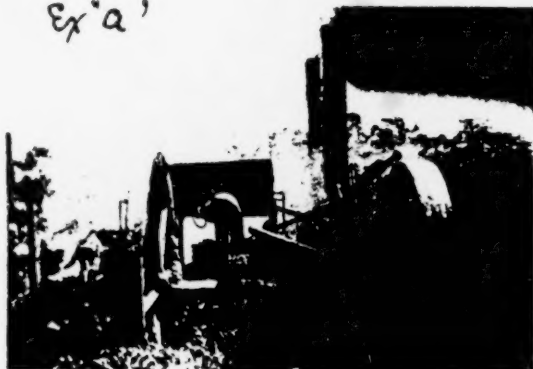
Clerk of Lyon Circuit Court.

(Here follow photographs marked page 347.)



Exhibits A.B. 'C. and D. filed, with the depositions
of W. Cunningham as follows:

Ex 'a'



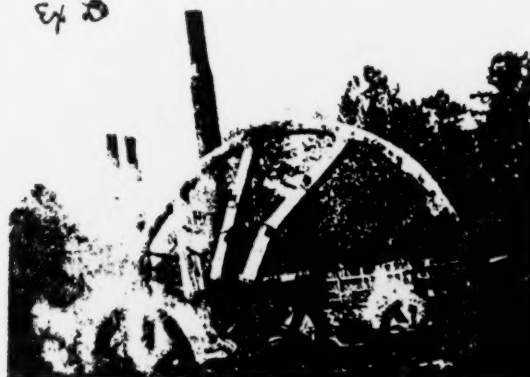
Ex 'b'



Ex 'c'



Ex 'd'





348 Orders of the Lyon County Court, 13th day of August, 1909;
Special Term.

Present: Hon. W. L. Crumbaugh, Judge.

COMMONWEALTH OF KENTUCKY, by Arthur E. Hopkins, Revenue
Agent for the State at Large, Plaintiff,

vs.

EWALD IRON COMPANY, Defendant.

Judgment.

This cause coming on to be heard, upon the pleadings, exhibits and proof and the Court being advised, orders and adjudges that the defendant, the Ewald Iron Company, for the year 1907, upon an assessment made of September 1st, 1905, omitted to list for assessment for taxation intangible personal property consisting of cash on deposit in bank \$75000.00, and accounts \$25000.00, and this was all the intangible personal property omitted by said defendant for the year 1907.

That for the year 1908, upon an assessment made as of September 1st, 1907, the defendant omitted to list for assessment for taxation intangible personal property consisting of cash on deposit in bank \$75000.00, and accounts \$25000.00, and this was all the intangible personal property shown to have been omitted by said defendant for the year 1908.

349 That for the year 1909, upon an assessment made as of September 1st, 1908, the defendant omitted to list for assessment for taxation intangible personal property consisting of cash on deposit in bank \$75000.00, and accounts \$25000.00, and this was all the intangible personal property omitted by said defendant for the year 1909.

The Clerk of this Court is ordered and directed to certify this judgment to the Auditor of this State and the Sheriff of this County. The Sheriff is directed to collect said tax, costs and penalty as other taxes are collected by him, and to pay the penalty to M. J. Holt, Attorney of Record.

The County Attorney was present and assisted in the prosecution of this action.

(Signed)

W. L. CRUMBAUGH, *Judge.*

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EXHIBIT Y, WITH REPLY.

COMMONWEALTH OF KENTUCKY, by Arthur E. Hopkins, Revenue Agent, Plaintiff,

vs.

EWALD IRON COMPANY, Defendant.

Answer.

351 The defendant, Ewald Iron Company, for answer herein, says it is not true that on September 1, 1903, or September 1, 1907, or September 1, 1908, it omitted from assessment for taxation any of the items set forth in the statement filed herein, except that it admits it had on deposit in banks in Kentucky and Missouri \$75,000 and that it had outstanding accounts of the value of \$25,000 on the 1st day of September of each of said years, which were omitted from assessment any other property than that herein expressly admitted, as to which it is now willing to be assessed in full of all omission for said three years.

Wherefore, etc.

GIBSON, MARSHALL & GIBSON,
Attorneys for Defendant.

This is a certified copy of an answer on file in this office which was filed Aug. 13, 1909. This 13th day of November, 1914.

U. S. KING,
Clerk of the Lyon County Court,
By FRED GEORGE, D. C.

352 Said Stipulation filed on the 8th day of February, 1915, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

Stipulation.

It is stipulated between the Commonwealth of Kentucky, by E. C. Huntsman, Revenue Agent, and Lyon County, Kentucky, and the City of Louisville, and Fidelity & Columbia Trust Company, Executor of L. P. Ewald, deceased, as follows:

(1.) The affirmative allegations of the reply filed herein on the

16th day of December, 1914, by the Commonwealth of Kentucky and Lyon County, shall be treated as specifically traversed of record, except that it is admitted that the copies filed are true copies of the answer and judgment filed in said case and referred to in said
 353 reply as Exhibits "Y" and "X."

(2.) That the Commonwealth of Kentucky, by Arthur E. Hopkins, Revenue Agent, brought an action against the Ewald Iron Company, in the Lyon County Court, to assess taxes for the year 1910 as of September 1st, 1909, in which action judgment was rendered and an appeal thereafter taken to the Court of Appeals of Kentucky, and an opinion thereafter rendered in said case which is reported in 140 Ky. 692, and an extended opinion in 142 Ky. 465, and in said cause such pleadings were filed, agreements made, and actions taken as appear in the Transcript of Record in the Court of Appeals of Kentucky, a certified copy of which is filed herewith as Exhibit "A", to show what was done in said case, subject to exceptions for irrelevancy and incompetency.

In testimony whereof witness the signatures of the respective parties hereto, by their respective counsel, this 6th day of February, 1915.

COMMONWEALTH &
 LYON COUNTY.

By M. H. THATCHER, *Att'y*;
 TRABUE, DOOLAN & COX,
 STUART CHEVALIER,
 GEO. CARY TABB,

Att'ys for City of Louisville.
 GIBSON & CRAWFORD,
Att'ys Col. Trust Co., Ex'or, &c.

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Lyon County Court.

COMMONWEALTH OF KENTUCKY, by Arthur E. Hopkins, Revenue Agent, Plaintiff,

vs.

EWALD IRON COMPANY, Defendant.

Agreed Statement of Facts.

The statement filed herein shall be deemed to be controverted, and the following statement of facts is agreed to by the parties hereto as the evidence on which this proceeding is to be heard and decided.

I.

The Ewald Iron Company, defendant herein, was incorporated under the general laws of the Commonwealth of Kentucky under date of November 5th, 1880, for a term of twenty-five years, with its

principal office and place of business in Lyon County, Kentucky. A copy of its Articles of Incorporation is filed herewith as part hereof.

II.

Said Company actively conducted its business in Lyon County for a number of years, when, and prior to 1910, it removed
355 its active place of business to the city of Louisville, and thereafter continued the same exclusively at Louisville, retaining but not using some of its property in Lyon County.

III.

Prior to November 5th, 1905, when, by the Articles of Incorporation, the Ewald Iron Company expired by limitation, one L. P. Ewald became and continued to be the sole stockholder of said Company. He resided in Louisville, Kentucky, and died there on the — day of July, 1909, having first made his will which was on August 4th, 1909, duly probated in the Jefferson County Court. The Columbia Trust Company of Louisville was appointed executor of said will and duly qualified as such on said date, and has ever since been acting in that capacity. There came to its hands all the capital stock of the Ewald Iron Company outstanding.

The business of the Ewald Iron Company was continued in all respects in its corporate name, and as if its corporate existence had continued until after September 1, 1909, when said Company was formally dissolved, and its affairs have since been practically wound up. There was until then no change of title to any of its properties which were extensive and valuable, located in Lyon County,
355½ in Jefferson County and in St. Louis, Missouri. It continued to make contracts, incur debts, and, in fact, carry on a large and profitable business in exactly the same manner, it had done before the expiration of its corporate existence until after September 1, 1909.

V.

For some time prior to November 5th, 1905, and continuously until his death, it was the intention and purpose of said L. P. Ewald to re-incorporate said Ewald Iron Company in the same name, and continue business without interruption, and for this purpose he caused the Articles of Incorporation to be prepared which he repeatedly declared his intention to have executed by himself and other incorporators and stockholders, but he neglected to have this done, and the business was continued in the name of the old Company until his death, and afterwards until it was dissolved.

VI.

After the death of said L. P. Ewald, his executor, the Columbia Trust Company, transferred some shares of stock of the Ewald Iron Company to other parties; caused a Board of Directors and all

necessary officers to be elected, so that said company had an effective corporate organization. This was done with a view to dissolving and winding up said company, which has since been practically done, but after September 1, 1909.

VII.

On the first day of September, 1909, the said Ewald Iron Company had on deposit in various banks in St. Louis, Missouri, the sum of \$1,800,000 which represented, and was, in fact, accumulated earnings and profits of said Company which had never been distributed. For more than half of this sum, certificates of deposit bearing interest were issued to the Ewald Iron Company, payable to it, and the balance was deposited as open accounts in the name of said Company, bearing interest and payable only on the check of the Ewald Iron Company.

The books of the Ewald Iron Company showed all of these deposits and they were carried on the books as assets of said company on the first day of September, 1909.

VIII.

On the — day of October, 1909, all of the deposits aforesaid were by the banks holding the same, transferred and paid to the Treasurer of the Ewald Iron Company, and were afterwards disposed of by the directors of said Company in liquidating its affairs, until which time there had been no change of title to any of said money from the Ewald Iron Company.

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IX.

The Assessors of the City of Louisville and of Jefferson County, Kentucky, claim that the said money on deposit in St. Louis in the name of the Ewald Iron Company was in law and in fact the money of L. P. Ewald's estate, and not the money of the Ewald Iron Company, and said assessors have assessed the said identical money on deposit as aforesaid as of the first day of September, 1909, for the year 1910, in the name of L. P. Ewald's Executor, an appeal will be taken from said assessment of the — and tax bills based on said assessments are now in the hands of the Collector of taxes for the city of Louisville for collection.

Said Assessments are based on the ground that said L. P. Ewald by reason of his ownership of all the capital stock of the Ewald Iron Company, under the circumstances herein set forth, was in law and fact the owner of the money of the Ewald Iron Company aforesaid, and under the duty of personally paying taxes thereon at the place of his residence in Louisville, Kentucky.

X.

No other property of said Ewald Iron Company except the said money has been omitted from taxation for the year 1910.

358 Its other properties have been heretofore continuously assessed in its name in Lyon County and Jefferson county, including the assessment for the year 1910.

P. B. MUIR,
GIBSON, MARSHALL & GIBSON,
Att'ys for Ewald Iron Company.
M. J. HOLT.
Att'ys for Arthur E. Hopkins, Rev. Ag't.

Articles of Incorporation.

We, the undersigned, Louis P. Ewald, and Charles P. Damon, both of the City of St. Louis, and State of Missouri, do hereby associate ourselves together to form a corporation under the law of State of Kentucky, in accordance with the provisions of Chapter 56 of the Revised (General) Statutes of the State of Kentucky, in relation to incorporated companies, and Acts amendatory thereof, for the purpose following, viz:

First. Said corporation shall have all the powers and privileges enumerated and conferred by said Act.

Second. The private property of the members of said corporation shall be exempt from any liability for corporate debts.

359 Third. The name of said corporation shall be the "Ewald Iron Company", and the principal place of transacting its business is in the "Tennessee Rolling Works" in Lyon County, Kentucky.

Fourth. The business of said corporation shall be the manufacture of iron at the said "Tennessee Rolling Works", in the county of Lyon and state of Kentucky, and the selling of the product of its manufacture and such articles as are connected therewith.

Fifth. The capital stock of said corporation shall be Two hundred thousand dollars (\$200,000.00) to be divided into two thousand shares of the par value of One hundred dollars (\$100) each; but said corporation shall not commence business until Stock to the amount of one hundred and twenty-five thousand dollars (\$125,000.00) shall have been subscribed thereto. Said stock subscribed shall be fully paid up within three months from the date hereof in cash, and any future subscriptions shall be paid up as subscribed.

Sixth. Said corporation shall continue for twenty-five years, commencing with the date hereof.

360 Seventh. The business shall be conducted by a Board of two Directors, who shall be elected annually on the first Tuesday of November at such place as the By-Laws shall provide; and the Board of Directors for the first year shall be L. P. Ewald, and Charles P. Damon, and the Board of Directors shall elect a President and Secretary, and appoint such other officers and agents as the by-laws may authorize.

Eighth. The highest amount of indebtedness or liability direct or contingent to which said corporation is at any time to be subject shall never exceed the sum of one hundred and thirty thousand dollars.

In testimony whereof, we have hereto set our hands and seals this the Fifth day of November in Eighteen Hundred and Eighty.

LOUIS P. EWALD.
CHARLES P. DAMON.

Afterwards on May the 4th, 1910, the following judgment was filed in the Lyon Circuit Court, to-wit:

Lyon County Circuit Court.

COMMONWEALTH OF KENTUCKY, &c., Plaintiff,

vs.

EWALD IRON COMPANY, Defendant.

Judgment.

361 This cause coming on to be heard upon the pleadings, exhibits, proof and the agreed statement of parties filed herewith, and the further stipulation that the \$1,800,000 cash in bank was not listed nor assessed for taxation in Lyon County, Ky., for state, county and district taxes for the year 1910, and the court being advised, orders and adjudges:

First. That the principal office and place of business of the Ewald Iron Company on September 1st, 1909, was in Lyon County, Kentucky, and that said company still had a corporate existence so far as its liability for assessment and taxation were concerned.

Second. That the Ewald Iron Company of Lyon County, Kentucky, and not the estate of L. P. Ewald was on September 1st, 1909, the owner and in possession of the property sought to be assessed in this proceeding, to-wit: \$1,800,000.00 cash in bank to the credit of the Ewald Iron Company.

Third. That the situs for taxation for the one million eight hundred thousand dollars cash in bank to the credit of the Ewald Iron

362 Company consisting of accumulated earnings and profits of said Company on Sept. 1st, 1909, was at the domicile of the owner the Ewald Iron Company on District No. one Lyon County, Kentucky, and was not assessed for taxation. That said property of the defendant, Ewald Iron Co. is liable for assessment and is hereby assessed for state, county and district taxes for the year 1910 at said domicile.

Fourth. That no other property of defendant company was omitted from assessment for taxation in Lyon County, Kentucky, for the year 1910.

The judgment of the Lyon County Court assessing said property is hereby affirmed, and this cause is remanded to the Lyon County Court with directions to enter the necessary orders assessing said property consistent with this judgment, the plaintiff herein Commonwealth of Kentucky is given judgment for its costs.

The County attorney, J. S. Hodges, was present and assisted in the prosecution of this case.

To which judgment defendant and appellant, Ewald Iron Company, objects and excepts and prays an appeal to the Court of Appeals which is granted.

(Signed.)

J. S. HODGES, *County Att'y.*
M. J. HOLT, *for Pl'ff.*

Afterwards on the 23rd, day of September 1910, the following order was entered herein:

Came the appellant by counsel and filed brief on the motion to postpone the hearing of the case.

Court of Appeals of Kentucky.

EWALD IRON COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Brief for Appellant on Motions of Clayton B. Blakey, Esq.

Without notice to appellant, or to appellee so far as I know, Mr. Blakey, as I learn from the newspapers asked leave to be permitted to appear as amicus suriae, and moved to continue the case until a suit instituted in the Jefferson Circuit court a few days ago can be heard and decided and brought here on appeal.

362b Failing on this motion he asks for an oral argument to which there is no objection.

In view of what has taken place in connection with this case, common courtesy demand- that Mr. Blakey should have given notice of his motions, and not tried to make it appear that an attempt was being made to impose a collusive case on the court.

Some time ago, I called Mr. Blakey's attention to this case: explained it was one in which the City of Louisville was interested and urged him to file a brief in it. He promised he would do so. Later, I sent him a copy of the record, repeated the invitation to file a brief and offered to secure such extension of time as his convenience might require.

This courtesy was repaid by the motions made to-day without notice—the purpose being evidence.

Mr. Blakey knew perfectly well that if he thought it necessary to appear as amicus curiae and to make any motions in that capacity he would readily obtain my consent for, he knew I desired him to take an active part in the case.

362c He prefers, however, to place me in a false position before the Court by not giving me a chance to show not only my willingness by my earnest desire that he should appear.

Appellant objects to the postponement asked for. The court does not know and can not know that the suit recently instituted

in the Jefferson Circuit Court will ever be appealed to this court and in no event can the result in that case affect the result in this. The facts are bound to be the same in both case- because there can be no dispute about them. If Mr. Blakey could show, or if he does, a different state of facts in this case, then, of course, the decision in this case will not control his case. In no event can his case be hurt.

Had Mr. Blakey shown any diligence, his case would have been filed long ago and might have been ready to be heard in this court.

It is a matter of difference to me whether Mr. Blakey appears as amicus curiae or on my invitation, though my appreciation of the courtesy shown him would have induced him to have it appear that he was in the case by my invitation.

I have no objection to, but unite in, the motion for an oral argument.

Respectfully submitted,

C. H. GIBSON,
Attorney for Appellant.

Filed Sep. 22, 1910.

Napier Adams, C. C. A.

363 The following opinion was delivered at the same time
the above judgment was rendered:—

Court of Appeals of Kentucky.

November 22, 1910.

EWALD IRON COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Lyon Circuit Court.

Opinion of the Court by Judge Hobson.

Arthur E. Hopkins, as revenue agent, instituted this action in the Lyon Circuit Court against the Ewald Iron Company to list for taxation \$1,800,000.00 in money as omitted property as of September 1, 1909, for the year 1910. The county court entered a judgment in favor of the plaintiff; an appeal was taken to the circuit court which sustained the county court. From this judgment, the appeal before us is prosecuted.

The case was submitted in the county court and in the circuit court on an agreed statement of facts, which are in substance as follows: The Ewald Iron Company was incorporated under the General Statutes of Kentucky on November 5, 1880 for a term of twenty-five years with its principal office and place of business in

Lyon county as specified in the articles of incorporation.

364 The company conducted its business in Lyon county for a number of years but prior to the year 1900, it removed its active place of business to the city of Louisville and thereafter continued its business operation at Louisville, retaining but not using its property in Lyon County. Prior to November 5, 1905, L. P. Ewald became and continued to be the sole stockholders of the Company. He resided in Louisville and died there in July, 1909, leaving a will which was afterwards probated. All the capital stock of the Ewald Iron Company outstanding, came into the hands of his executor. The business of the Ewald Iron Company was continued after the expiration of the charter, on November 5, 1905, in its corporate name in all respects as if its corporate existence had continued until September 1, 1909, when the Company was formally dissolved, and its affairs have since been practically wound up. There was until then no change of title to any of its extensive and valuable properties in Lyon County, and Jefferson County, Kentucky, and in St. Louis, Missouri. It continued to make contracts, incur debts, and carry on a large business after its charter expired in exactly the same way as it had done before it expired. For some time prior to November 5, 1905, and continuously until his death, it was the purpose of L. P. Ewald to reincorporate the Ewald Iron Company, and for

365 this purpose he caused articles of incorporation to be prepared which he repeatedly declared his intention to have executed. But this he neglected to do, and the business was continued in the name of the old company until his death, and until the company was dissolved after his death, subsequent to September 1, 1909. On September 1, 1909 the Ewald Iron Company had on deposit in various banks in St. Louis, Missouri, the sum of \$1,800,000.00, which represented and was in fact the accumulated earnings and profits of the company which had never been distributed. For more than half of this sum, interest bearing certificates of deposit had been issued to the Ewald Iron Company payable to it, and the balance was deposited as an open account in the name of the company bearing interest and payable only on the check of the Ewald Iron Company. The books of the Ewald Iron Company showed all of these deposits and they were carried on the books as assets of the Company on the first day of September, 1909. In October, 1909, the deposit were all paid by the banks holding them to the Treasurer of the Ewald Iron Company, and were afterwards disposed of by the directors of the Company in liquidating its affairs, until which time there had been no change of title to any of said money from the Ewald Iron Company. The executor of L. P. Ewald had transferred some shares of stock of the company to other persons, and caused a board of directors

366 and all necessary officers to be elected, so that the company had an effective corporate organization. This was done with a view to dissolving and winding up the company, but after September 1, 1909. The assessors of the city of Louisville and of Jefferson County claiming that the money on deposit in St. Louis in the name

of the Ewald Iron Company was in law and in fact, the money of L. P. Ewald's estate, assessed it, as of September 1, 1909, for the year 1910 in the name of L. P. Ewald's executor, and tax bills based on these assessments were placed in the hands of the collector of taxes for collection. No other property of the Ewald Iron Company except this money has been omitted from taxation for the year 1910. Its other properties have all been assessed in its name in Lyon County, and in Jefferson County.

There is no dispute between the parties that the property is liable to assessment. The only question made is whether it should be assessed as the property of the Ewald Iron Company in Lyon county or in the name of L. P. Ewald in Jefferson County. It is agreed that Lyon county was the residence of the corporation, and if the property should be assessed in its name, it must be assessed there. It is also agreed that Jefferson county was the residence of L. P. Ewald, and if the property should be assessed in his name it should be assessed in

Jefferson county. The city of Louisville has appeared in the 367 case by its attorney, insisting that the Jefferson county assessment should be sustained. Ewald's representatives have brought the case to this court; that they may not be taxed twice; although it is to the interest of the estate that the judgment of the Circuit Court should be sustained as the rate of taxation is lower in Lyon County than in Louisville.

Section 561 Ky. St. among other things provided:

"And when any corporation expires by the terms of the articles of incorporation * * * it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible, and they shall cause notice to be published for at least once a week for four consecutive weeks in some newspaper printed and published in the county, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything."

Practically the same provision was contained in the General Statutes under which the corporation was formed. (General 368 Statutes, page 766, section 13). When the charter of the

Ewald Iron Company expired, it wholly disregarded the statute. It did not proceed in any sense to close up its business, and took no steps in this direction, but continued to do business just as it had before in disregard of the statute. It is earnestly insisted for appellee that the corporation does not die when its articles of incorporation expire, but that it continues in existence for the purpose of winding up its business, and that so the title to its property remains in it until its business is wound up. The statute provides that the corporation shall continue to act for the purpose of closing up its business but for no other purpose. When, as in this case, the corporation continues to act and carry on its business as before, taking no steps to close up after the articles of incorporation have expired, the stockholders are simply doing business as partners. They are personally liable for all debts made, and acts done are not the acts of the corporation but the acts of the stockholders. The situation for

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the purposes of taxation is precisely the same as in any other case of partnership; that is, the property should be given in for taxation in that county where it would be given in for taxation if the parties had done business under a firm name, and not under the name of a corporation. The corporation having expired and the acts done being the acts of the partners, the money made is the property of the partners, and not the property of the corporation. The corporation is required by the statute to close up its business; the meaning of the statute is that it shall have a reasonable time for this purpose; but after a reasonable time had elapsed, the real owners of the property cannot be allowed to say that the corporation is still in existence for the purpose of closing up its business, and thus defeat a claim for taxes. It is true there was only one stockholder in this case, but the fact that there was but one stockholder does not change the legal aspect of the case; L. P. Ewald was simply doing business in the name of the Ewald Iron Company, not as a corporation; for the corporation had expired, but for himself, and for the purposes of taxation the rights of the parties are not different from what they would be if he had done business in the name of L. P. Ewald and Company. He was the sole stockholder; he had charge of the corporation. Having control of the corporation he did not wind it up, and in disregard of the statute, continued to do business in that name, thus failing to give in the property for taxation as his property at his residence. The reason it was done is not difficult to see. The money was deposited in St. Louis in the name of the Ewald Iron Company. It thus escaped taxation altogether. If taxed in Lyon County he would have to pay only a fraction of what he would have to pay in Jefferson county and so the money was kept in the name of the Ewald Iron Company, whose home was in Lyon County. The money had no situs in St. Louis; it was simply deposited there. It was personal property which followed the person and was subject to taxation at the domicile of the owner. The owner of the property on September 1, 1909, was L. P. Ewald's executor, and its domicile was in Louisville. In matters of this sort the court will not allow a device to defeat the purposes of the Statute. The purpose of the statute is to place the burden of taxation equally upon all taxpayers; and if such a course as was here followed may be sustained to escape taxation at the residence of the real owner the purpose of the Statute would be defeated.

While the existence of the corporation continues after the expiration of its articles of incorporation, for the purpose of winding up its business, this continuance of its existence is for that purpose and no other. The continued existence of the corporation cannot be extended by the failure of its officers to comply with the statute. They have a reasonable time to wind up its business, but when such reasonable time has expired, they cannot be heard to say that the corporation is still in existence, and thus defeat their liability for taxes at their residence. After the expiration of a reasonable time for closing up the business of the corporation, it is not in existence under the statute, and the title to its property vests

in the stockholders for the purpose of taxation; for the law will not allow one to profit by his own wrong. On the contrary, the law will hold that as done, in such cases, which ought to have been done. Two years is a reasonable time ordinarily for closing up the business of a corporation, and where the provisions of the statute are entirely disregarded, the parties will not be heard to say that two years is not a reasonable time. We therefore conclude that the corporate existence of the Ewald Iron Company expired for all purposes long before the death of L. P. Ewald, and that the money here in controversy is taxable as his property at his residence.

Judgment reversed and cause remanded for a judgment consistent herewith. Judge O'Real dissents.

C. H. Gibson, Gibson, Marshall & Gibson, John C. Yates, for appellant.

M. J. Holt, McQuown & Beckham, J. S. Hodges, for appellee.
Clayton B. Blakey, Amicus Curiae.

372 Afterwards on the 2nd day of January, 1911, the following order was entered herein:

Came appellant by counsel and the motion extending it time to January 2nd next to file petition for rehearing is noted of record.

On January 21, 1911, the following petition of appellant for extension of opinion appears marked filed in this case:

Court of Appeals of Kentucky.

EWALD IRON COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Petition by Appellant for Extension of Opinion.

I regret having to trouble the court to do something which, to me, seems wholly unnecessary.

Counsel representing the State, and the city of Louisville, do not agree with me, however, in my interpretation of the opinion, and to avoid a further appeal, and to bring about an adjustment of the flood of tax suits pending and contemplated, it seems necessary the court should extend the opinion and leave no room for question as to

373 its meaning. It seems perfectly clear to me that the opinion can not be tortured into meaning anything else than that in two years after the expiration of the Ewald Iron Company the title to all of its property passed to L. P. Ewald, the sole stockholder, and thereafter was subject to assessment against him.

The very purposes, and, indeed, the only purpose of the court in saying what would be a reasonable time to wind up the company

was, as I view it, to draw the line, and fix with certainty the period for which the company should be assessed in Lyon county, and the time when Ewald should be assessed in Louisville. No doubt it occurred to the court that unless it did draw this line definitely there would be a controversy in the lower court and another appeal in order to settle the question.

The reasonable time fixed by the court for winding up the company expired in November, 1907. This left the personal property (money in bank) assessable in Lyon County against the Company up to and including the taxes for the year 1908. Commencing with the year 1909, it became assessable against Ewald in Jefferson County.

Counsel for the city of Louisville and for the revenue agent insist that the opinion does not mean this, and hence I am constrained to ask the court to say that it does.

Respectfully submitted.

CHAS. H. GIBSON,
Counsel for Ewald Iron Co.

374 P. B. MUIR,
Of Counsel.

"Filed Jan. 21, 1911. Napier Adams, C. C. A."

On the 23rd day of January, 1911, there appears marked filed a response to the petition for extension of opinion in words and figures, as follows:

Court of Appeals of Kentucky.

EWALD IRON COMPANY, Appellant,

VS.

COMMONWEALTH OF KENTUCKY, Appellee.

Response of Appellee to Appellant's Petition for Extension of Opinion.

Bryce in "The American Commonwealth" commenting on Justice Marshall and the reasons for his greatness as a Judge says—"Marshall did not forget the duty of a judge to decide nothing more than the suit before him required." If the Judge who passed on this Petition for Extension "and it is always as the Statutes says, a judge other than the one writing the opinion, entertains the same views

or regards the same rule it will be over-ruled, in spite of the fact that Counsel for Appellant says that his petition is filed "to avoid a further appeal and to bring about an adjustment of the flood of tax suits pending and contemplated," which suits undoubtedly will continue whether this opinion be extended or not.

I cannot conceive why the opinion in this case should be extended along the line indicated. On the contrary, I think the Court should treat as dicta and strike from the opinion the expression—"Two years is a reasonable time ordinarily for closing up the business of

a corporation and where the provisions of the statute are entirely disregarded the parties will not be heard to say that two years is not a reasonable time."

The only issue involved in this case was who was the owner of the \$1,800.00 deposited in bank to the credit of the Ewald Iron Company on September 1, 1909, and therefore liable for the taxes for 1910. The Court decided and could only decide that this money was the property of L. P. Ewald on that particular date.

It was not necessary to decide or declare how long the Ewald Iron Company should have been given after the expiration of the period of its charter existence to wind up its business and the case was neither prepared nor the record made up nor presented on
376 that issue.

The agreed facts in this case show that on (111) "November 5, 1905, when the Articles of incorporation the Ewald Iron Company expired by limitation, one L. P. Ewald became and continued to be the sole stockholder of said Company."

Now if Your Honor was the sole stockholder of a company and that corporation was out of debt with \$1,800,000 deposited in bank to its credit would it take you two years or two weeks to wind up the Company?

What has the status of this Company and L. P. Ewald prior to September 1, 1909 to do with this case? This case was submitted on an agreed statement and was between the Commonwealth and Lyon County and the Ewald Iron Company involving the assessment for 1910. The case- now pending in the courts of Jefferson County are between the State, Jefferson County and the City of Louisville against L. P. Ewald's Estate and involve the assessment of L. P. Ewald's property for the years 1905 to 1910 inclusive. There is no agreed statement constituting a part of the record in these cases.

The purpose of Appellant, (who unfortunately for him and to his surprise won this case in this court) is to use the opinion of this Court to defeat these just claims asserted by the State, Jefferson County and the State against the Estate of L. P. Ewald.

377 He now wants this court to decide that for the years 1907, and 1908, covering the assessing periods September 1, 1906, and September 1, 1907, the money in bank was the money of the Ewald Iron Company and not L. P. Ewald's, in order that he may escape from taxation for those years; or plead in bar to these actions the judgments entered in the Hawn proceeding file- in Lyon County the same day the statements were filed and a copy of which is with Mr. Blakey's motion that the City be heard as a party to the record in this case.

Is this Court going to assume jurisdiction and pass on who was the owner of this property on September 1, 1903, and September 1, 1907, when the record in this case only involved and presented the issue of ownership as of September 1, 1909?

If it thinks that this is a question properly before the Court at this time I submit using the opinion in this case (and there is no other

authority) as my authority that the money in bank be declared the property of L. P. Ewald and not the Ewald Iron Company.

Respectfully submitted,

M. J. HOLT,
For Appellee.

"Filed Jan. 23, 1911. Napier Adams, C. C. A."

378 On February 4, 1911, there appears filed in this case a response to the above petition, which is as follows:

Court of Appeals of Kentucky.

EWALD IRON COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Response to Petition for Estension of Opinion.

The question in this case was whether the taxing authorities of Lyon County could assess for taxation certain intangible personal property which stood in the name of the appellant on September 1, 1909. It will be remembered that the appellant's charter had expired on November 5, 1905. L. P. Ewald was then the sole stockholder of the appellant. In the opinion this Court held that the property of such a company continued to be such only for a sufficient length of time to permit to wind up its affairs; that thereafter its property became the property of the stockholders of such company. In the case at bar this Court held that on September 1, 1909, the appellant did not own the property in question, for the reason
379 that sufficient time had elapsed within which to wind up its affairs and dissolve prior to September 1, 1909; and therefore that the County of Lyon was without authority of law to assess the appellant as the owner of property.

Appellant now asks this Court to extend its opinion and say where the omitted property of the appellant, if any, was assessable for taxation in, 1906, 1907 and 1908.

These questions are not before the Court in this case. To so decide would be a mere obiter dictum and to no extent binding on the Court or on the parties. When those questions arise, the Court will of course consider and determine them.

There are questions of law arising as to the taxes for those years which cannot be raised on this record, and a decision of which would only embarrass the Courts in future litigation.

I, therefore, respectfully submit that the petition for an extension of opinion should be overruled.

Respectfully submitted,

CLAYTON B. BLAKEY,
Amicus Curie.

January 28, 1911.

Filed Feb. 4, 1911. Napier Adams, C. C. A.

On February 24, 1911, there appears to be on file as of that date an extended opinion of the court, which — as follows:

380

Court of Appeals of Kentucky.

February 24, 1911.

EWALD IRON COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Lyon Circuit Court.

Extended Opinion of the Court by Chief Justice Hobson.

In fixing two years as a reasonable time for a corporation to close up its business, the court followed the statute regulating the settlement of the estates of deceased persons (Ky. St., Section 3858-59). The corporation expired for business purposes on November 5, 1905.

The property held in its name should be taxed in its name and as its property until November 5, 1907; after that time it should be taxed in the name of L. P. Ewald, and as his property. It is important in these tax matters that a definite rule be laid down that the parties may conform to and avoid litigation cost and penalties.

The former opinion, 140 Ky., 692, is extended as above indicated.

381 C. H. Gibson, Gibson, Marshall & Gibson, Jno. C. Yates,
P. B. Muir, for appellant.

M. J. Holt, McQuown & Beckham, J. S. Hodges, for appellee.
Clayton B. Blakey, Amicus Curiae.

COMMONWEALTH OF KENTUCKY,

Court of Appeals, set:

I, Robt. L. Greene, Clerk of the Court of Appeals as aforesaid, do hereby certify that the foregoing 61 pages contain a true, full and complete copy of the record and proceedings had and on file in my office in this case of Ewald Iron Company v. Commonwealth on appeal from the Lyon Circuit Court, the case being numbered 39,289, filed away.

Witness my hand as Clerk this 30th day of December, 1914.

ROBERT L. GREENE,

Clerk of the Court of Appeals of Kentucky.

At a Court Held on the 8th Day of May, 1915.

The Court being advised, delivered a written opinion, which is file- herein and made a part hereof.

382 Counsel will prepare an order in accordance with the rulings of the Court.

Said opinion filed on the 8th day of May, 1915, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, Second Division.

CITY OF LOUISVILLE et al., Plaintiff,

VS.

COLUMBIA TRUST COMPANY, Executor, Etc., Defendant.

Opinion.

The revenue agent on behalf of the Commonwealth and Lyon County instituted proceedings in the Lyon County Court to assess retrospectively for State and County taxes certain personalty of the Ewald Iron Company. After trials in the Lyon County Court and in the Circuit Court for that County, the litigation was taken to the Court of Appeals. Simultaneously the City of Louisville brought suit in the Jefferson Circuit Court upon certain tax bills issued by the City Assessor upon retrospective assessments, seeking to collect taxes for the same and other years upon substantially the same property involved in the Lyon County case. In both proceedings, the circuit courts entered judgment against the defendant and in the court of appeals the two actions were heard together.

383 For many years prior to 1880 L. P. Ewald was a resident of St. Louis, Missouri, and with various associates was there engaged in the business of buying and selling iron. In that year he organized a Kentucky corporation, designating Lyon County as the chief place of business, and bought the lands and mills of the Old Tennessee Rolling Mills, located in Lyon County, for the purpose of manufacturing iron. His corporation was known as the Ewald Iron Company and the St. Louis office and warehouse were continued as a means of disposing of the output of the Kentucky mills. Because of inadequacy of transportation facilities Ewald bought an old rolling mill at Louisville, Kentucky, and in 1886 abandoned the mills in Lyon County. From that time until his death, in 1909, the iron which was sold by the St. Louis office was manufactured by the Louisville plant. In the meantime Ewald became a resident of Louisville, and, having acquired all of the stock in the Ewald Iron Company, he personally managed and directed the rolling mill at Louisville and the sales agency at St. Louis. In 1905, the charter

384 of the corporation expired by limitation and thereafter Ewald as the stockholder became the individual and sole owner of all of the corporation's property and assets.

The iron manufactured was either shipped to a customer directly from Louisville or to St. Louis, from which latter point it was distributed to the various purchasers. A small amount of iron of an inferior grade was purchased by the St. Louis agency to supply the needs of some customers, largely as an accommodation to the trade. At the mills in Louisville a set of books was kept and at the St. Louis agency another set of books was kept, and the output of the mills was billed or charged to the St. Louis selling agency at a price and the latter "billed" the merchandise at another price to the customer. The selling of the product was largely if not wholly done by the St. Louis office, the collections were made by that office and the money all deposited in St. Louis banks. Ewald personally managed and controlled the office at St. Louis, hiring and discharging managers, bookkeepers and salesmen. By personal visits and by daily telephoning he was in active and constant control of the St. Louis office. All the funds resulting from the business were kept on deposit in divers banks in St. Louis in the name of the corporation, but were wholly managed and controlled by Ewald, who

385 from time to time signed such checks as the St. Louis office required for expenses. The only funds brought to Louisville were such as Ewald needed for his personal use and the operation expenses of the mills. These funds were not brought to Louisville by the ordinary business channels, as by draft or check, but under Ewald's direction the St. Louis bookkeepers procured and sent him New York exchange.

These deposits in the St. Louis bank in 1903 amounted to something less than \$1,000,000, and at the time of Ewald's death, in 1909, they aggregated about \$2,000,000. Of this money only \$25,000 was kept on open account for use by the St. Louis agency. None of these deposits was ever returned for taxation, the St. Louis office some years reporting for taxation \$500 and some years nothing.

After *re* removal of the business from Lyon County to Louisville, in 1886, no business of any kind was done in Lyon County; the mill there was abandoned, and such of the machinery as was serviceable was brought to Louisville and installed. Since then the buildings have rotted down or been carried away and the land rented for farming purposes. Lyon County as a place of business existed in name only.

Upon this hearing counsel for the defendant is again urging with skill and force the same reasons which he urged in this court upon the former trial and also in the Court of Appeals.

386 They appear in the brief as follows:

"(1.) That L. P. Ewald could not be individually taxed for the Ewald Iron Company's money in St. Louis in any event prior to November 5, 1907.

(2.) That the Ewald Iron Company money in St. Louis banks

arose out of business done in Missouri and was permanently on deposit there; hence had no situs for taxation in this State.

(3.) That if taxable at all in this State, the money in St. Louis was taxable in Lyon County, the domicile of the corporation.

(4.) That for each of the years in question, Lyon County, through a revenue agent, and in the name of the Commonwealth, had secured a blanket judgment against the company for omitted personalty, which judgments were paid and are still in effect, and, therefore, the capital stock in the company cannot be taxed.

(5.) That as the City had once before arbitrarily retrospectively assessed the Ewald Iron Company for the years 1904 and 1905, those years, at least, could not be covered again.

387 1. The first contention seems to have been fully answered by this court, in its former opinion. In the extended opinion of the Court of Appeals in *Ewald Iron Company v. Commonwealth* 142 Ky. 465, the court was laying down a general rule for the government of taxing authorities in assessing the property of corporations whose corporate powers had ceased by limitation, and it could not have been the court's purpose to provide a rule by which a recalcitrant might escape the payment of the revenues due the government. Moreover, the corporation had not paid, as required by Section 4085 of the Kentucky Statutes, "on all of its property of every kind," and as Ewald was the sole stockholder and in absolute and active management of the corporation and himself responsible for the failure of the corporation to pay its taxes, his stock became subject to assessment. He was not entitled to the privileges provided for stockholders in Section 4088 of the Statute, exempting from taxation shares of stock in corporations which have paid taxes upon all their taxable property. That opinion was written five years after the corporation's charter had expired, and three years after the time allowed by law for winding up its affairs.

The defendant insists that the City of Louisville is bound by the opinion above mentioned reported in 140 Ky. and extended 388 in 142 Ky. It is sufficient to say that the City of Louisville was not a party to that suit, and its only appearance therein was in the appellate court when the City of Louisville was not a party to that suit, and its only appearance therein was in the appellate court when the City Attorney sought and was given leave to address that court. This view seems to have been taken by the Court of Appeals in these actions at bar else it would have affirmed the judgment of the Lyon Circuit Court and reversed the judgment of this court, and this ended this litigation.

2. The second contention raises the most serious question. If the taxable situs of the money earned by the corporation was in St. Louis, Missouri, then of course it was taxable in Missouri, and not subject to taxation in Kentucky at all, in either Lyon County or in the City of Louisville. By apt pleading the Federal question is presented, and numerous decisions of the Court of Appeals of this State and of the Supreme Court of the United States are cited and relied upon in argument. The question is not free from difficulty by any means, and should be decided for the defendant if certain language

of the Court of Appeals and of the Supreme Court is to be taken literally and without qualification.

389 In the case of Hillman Land & Iron Company, 148 Ky. 331, the court quoted with approval the New York court in *In Re Houdyer*, 150 N. Y. 37, where a non-resident who afterwards dies had deposited funds in a New York bank and the question of succession taxes upon the money arose. Under the circumstances of that case the court held the funds had a situs in New York. Silencing the contention that the credit in the bank to the depositor was so intangible as to follow the person the court said:

"While the relation of debtor and creditor technically exists, practically he had his money in bank and could come and get it when he wanted it. It was an investment in this state, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this State. The depository was a resident corporation, and the receiving and retaining of the money were corporate acts in this State. * * * Conceding that it was intangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act."

After the above question the Court of Appeals goes on to say in the Hillman case (*supra*):

390 "In the Dun case, in the Bluefield Banana Co. case, in the Houdyer case, in *Blackstone v. Miller*, 188 U. S. 189; *New Orleans v. Stemple*, 175 U. S. 309; *Buck v. Beach*, 206 U. S. 392; *Metropolitan Ins. Co. v. City of New Orleans*, 205 U. S. 395; *State Assessors v. Comptoir Natl. D. etc.*, 191 U. S. 388; *Liverpool & London Ins. Co. v. Board of Assessors*, 221 U. S. 346; *Commonwealth v. Peebles*, 134 Ky. 121; *Commonwealth v. West India Oil Ref. Co.*, 138 Ky. 828, and in many other cases decided by this and other courts, it has been firmly settled that money or intangible property of a non-resident is subject to taxation in the State in which it has an actual situs for business purposes, as when it is in the custody of an agent or fiduciary within the State who manages and controls it by lending it out, investing it, collecting the interest, and the like, or when it is the accumulation or income from the business done in the State or when it has been placed permanently on deposit."

The attention of this Court has been called to many other cases and particularly to *Commonwealth v. R. G. Dun & Co.*, 126 Ky. 108; *Higgins v. Commonwealth*, 126 Ky. 211; and the very recent cases of *Commonwealth v. B. F. Avery & Sons*, 163 Ky. 828, and *Wheeler v. New York*, 233 U. S. 434.

391 The Wheeler case is very similar to the Houdyer case, except that in the former the property consisted of notes, while the decedent had placed in a safety box in a New York bank. The striking feature of the opinion is the firmness of the court in its position as disclosed by the suggestion that if the former case of *Buck v. Beach* should be construed as in conflict with the principle of the Wheeler case, it should no longer be considered authority.

The Avery case (163 Ky. 828) has at first blush much in common

with the case at bar, but when the two cases are viewed together a distinction is to be made.

When one considers the rulings in *Commonwealth v. R. G. Dun & Co.*, 126 Ky., *Commonwealth v. West India Oils Co.*, 138 Ky., *Hillman Land etc. Co. v. Commonwealth*, 148 Ky., *Commonwealth Kentucky Warehouse etc. Co.* 143 Ky., *Commonwealth v. Prudential etc. Co.* 149, Ky., *Commonwealth v. Avery & Sons*, 163 Ky., it cannot be said with fairness that the Courts of Kentucky have shown any tendency to oppress the taxpayer, resident or foreign. Certainly in a — where the property has descended to infants and orphans the courts would rather resolve the doubt in their favor and deny the government its revenue than to wrongfully encroach upon their patrimony, however large. This is by the way. If the ancestor
 392 owed the tax and failed to pay, to the extent of that tax, the heir has an excess of rightful inheritance and he is not hurt by being required to pay.

It is proper to say that one may exercise a legal right and his motive in so doing cannot be questioned by the law. So one has the right to avoid taxation if he can do so lawfully. There can be no legal objection to one removing himself or his property, or a part of it, in order to avoid the payment of taxes to one jurisdiction provided the situs is really changed in good faith. In determining the situs of property the intention of the owner sometimes becomes important. In the case at bar there can be no doubt that the system employed was a device resorted to in order to escape the payment of taxes and if the scheme was illegal it will not be allowed to avail.

The corporation until it ceased to exist was a Kentucky concern and after 1883 its chief place of business was Louisville, Kentucky. It- is executive officer and sole stockholder lived in that City and conducted its business there. It- rolling mills were there and there was produced all its product. That its sales office was in St. Louis, Missouri, is true and the payments for its products were made in

393 St. Louis. The money thus acquired belonged to the Kentucky corporation and was as much a part of it as any other property it owned. Only a small part of it, \$25,000, was employed in the business and all the other was surplus or profits. Normally such profits are brought to the home office of a corporation for distribution among the stockholders. In this instance they were left half way in transit from the purchaser to the seller, and that detention was for a purpose as above-said. That it was deposited in St. Louis banks is a fact, but was it the intention of the owner to give it a situs there; to leave it there permanently? The fact that it was not reported to the taking authorities of Missouri would not tend to prove it. It was not employed there in the business, nor was it invested save as it earned a small interest as a deposit.

Does every deposit in a bank acquire a situs at the place of deposit? In the *Houdyer* case (*supra*) it did, but is not that case distinguishable from this? Is not the *B. F. Avery & Sons* case distinguishable from this? In none of the cases where the situs of intangible property has been allowed separate from the domicile of the owner was there a scheme or device employed to void taxation. In the *Hillman* case,

above mentioned, the Court of Appeals of Kentucky has this
394 to say:

"If it was shown by fact or circumstance that the income here exceed- the expense of the business, or that the practice of sending out of this State the money derived from business done in this State, and the returning to defray expenses of money to take the place of that sent out, was a device or scheme to evade the tax laws of the State, we would have no hesitation in holding the money subject to taxation. If a non-resident" (and a fortiori a resident like Ewald) "doing business in this State could evade taxation upon money in bank by merely adopting a course of business by which all the money collected here should at once be remitted to him, and in turn he would forward to this State the money to conduct the business, such scheme, if successful, would furnish an easy and simple method of escaping taxation on deposits. But it is scarcely necessary to add that such a scheme would not accomplish the purpose intended.

Again in a controversy between these same parties in *Ewald v. Commonwealth*, 140 Ky., the Court of Appeals said in part:

"The money had no situs in St. Louis, it was simply deposited there. It was personal property which followed the person and was subject to taxation at the domicile of the owner. The owner
395 of the property on September 1, 1909, was L. P. Ewald's executor, and its domicile was in Louisville. In matters of this sort the court will not allow a device to defeat the purpose of the statute."

If the money on deposit in St. Louis had acquired a situs there, then the ruling in *Ewald Iron Company v. Commonwealth* above mentioned, is no longer authority in this State. The court is required to hold that inasmuch as this question was presented to the Court of Appeals when this case was before it, and that court could have ordered a dismissal of these actions if it had deemed the location of the property to be St. Louis, that the question is not open. *Ewald etc. v. Commonwealth*, 159 Ky. 323.

3. The contention that if the property is taxable at all in this State it is taxable only in Lyon County is based upon the fact that Lyon County was designated as the principal place of business in the articles of incorporation adopted in 1880. To sustain this contention counsel rely upon *Covington v. Standard Oil Co.*, 137, *Langdon Creasy Co. v. Owenton*, 116 Ky. 564, and *Ewald Iron Company v. Commonwealth*, 140 Ky. 692.

It was admitted in the pleadings that the corporation's charter originally named Lyon County as its domicile or principal place of business. These cases were in the Court of Appeals and were
396 heard together and the court knew of the rule in the three cases cited and it could have then ended this litigation by saying that such designation concluded the matter. Instead the court returned the cases to this court to try the facts. In the enforcement of the payment of revenues due the government, courts no longer concern themselves with fictions, they deal with the facts. A corporation may change its place of business and the change becomes

a fact. If it has named one place and later moves to another and ceases to do any business at the place named, it would seem the duty of the corporation to amend its articles of incorporation but its failure to do so could have no effect upon the fact that it had actually changed its location. The principal place and the only place of business of the Ewald Iron Company was Louisville after the year 1886. The failure to amend the articles of incorporation and so say cannot alter the fact. We must deal with the substance and not the shadow.

4. The contention that Lyon County and the Commonwealth through a revenue agent has secured judgment for taxation for the years named and which judgment- were paid, scarcely needs an answer.

The corporation owned 5,700 acres of land in Lyon County and that land was the only property assessed against the concern during all the years preceding the death of Ewald. The records of Lyon County show nothing except the filing of an answer admitting the omission of \$5,000 for certain years and an agreed assessment for \$5,000 worth of property as omitted for the years named, and the payment of the taxes upon such assessment. Saying nothing of the methods employed, it is evident that this assessment did not include the million and more of dollars in controversy here. Moreover the city of Louisville was not a party to that proceeding and is not barred thereby. This device cannot avail the defendant.

5. In the opinion, dated April 27, 1912, filed in this record, this court fully answered the contention made by defendant, "that as the city had once before arbitrarily retrospectively assessed the Ewald Iron Company for the years 1904 and 1905, those years, at least, could not be covered again". The answer need not be repeated here.

For the foregoing reasons a judgment will be entered, dismissing the action brought in Lyon County, to-wit, Commonwealth by etc. v. Columbia Trust Company, executor, and giving judgment for the City of Louisville for the taxes set up in its petition and amendments thereto similar to the judgment heretofore entered. Reserve exceptions for the Commonwealth and for the defendant.

SAML. B. KIRBY, *Judge*.

On the 19th day of May, 1915, the following judgment was entered, to-wit:

No. 61955.

(Consolidated Action.)

CITY OF LOUISVILLE, Plaintiff,

vs.

FIDELITY & COLUMBIA TRUST COMPANY, Executor and Trustee of
L. P. Ewald, Deceased, Defendant.COMMONWEALTH OF KENTUCKY, by E. C. Huntsman, Revenue Agent
State at Large, Plaintiff,

vs.

FIDELITY & COLUMBIA TRUST COMPANY, Executor and Trustee of the
Estate of L. P. Ewald, Deceased, Defendant.*Judgment.*

399 This action coming on to be heard and having been submitted to the Court upon the pleadings, proof and exhibits, and the Court being sufficiently advised, it is considered and adjudged by the Court that the Plaintiff, City of Louisville, recover of the Fidelity & Columbia Trust Company, Executor and Trustee of the Estate of L. P. Ewald, deceased, the following amounts, to-wit:

\$18,600.00 being the face of tax bill No. 30277 for the year 1904, with interest thereon at the rate of one-half of one per cent per month or fraction of a month from May 1st, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$18,600.00 being the face of tax bill No. 17137 for the year 1905, with interest thereon at the rate of one-half of one per cent per month or fraction of a month from May 1st, 1910, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$22,500.00 being the face of tax bill No. 8029 for the year 1906, with interest thereon at the rate of one-half of one per cent per month or fraction of a month from May 1st, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$27,900.00 being the face of tax bill No. 26508 for the year 1907, with interest thereon at the rate of one-half of one per cent per month or fraction of a month from May 1st, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill.

\$32,375.00 being the face of tax bill No. 26621 for the year 1908, with interest thereon at the rate of one-half of one *year* per cent per month or fraction of a month from May 1st, 1911, until paid, and also for a ten per cent penalty on the face of said tax bill.

400 together with its costs herein expended for which it may have execution, to all of which the Fidelity and Columbia Trust Company, Executor and Trustee of the Estate of L. P. Ewald, deceased, excepts and objects and prays an appeal to the Court of Appeals, which is hereby granted.

It is further adjudged, that the petition of the Commonwealth by E. C. Huntsman, former Revenue Agent for the State at large, and by W. H. Byars, present Revenue Agent of the State at large, and of Lyon County, Kentucky, be and the same is hereby dismissed, and the Fidelity & Columbia Trust Company, Executor and Trustee of the estate of L. P. Ewald, deceased, may recover its costs against said E. C. Huntsman, former Revenue Agent of the State at large, and W. M. Byars, present Revenue Agent of the State at large and Lyon County, Kentucky, on its issues with the Commonwealth and Lyon County, to all of which the said Commonwealth and said Commonwealth by said Revenue Agents and Lyon County jointly and severally except and pray an appeal to the Court of Appeals, which is granted.

401 Jefferson Circuit Court, Chancery Branch, Second Division.

61955.

CITY OF LOUISVILLE, Plaintiff,

VS.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald, Deceased, Defendant.

The deposition of Mr. G. C. MARATTA, taken by agreement in the office of the City Attorney in Louisville, Kentucky, on the 25th day of April, 1913, said deposition to be read as evidence on behalf of the plaintiff on the hearing of the above styled cause, and said deposition being taken pursuant to Order of Reference entered in this action on the — day of April, 1913.

Mr. Maratta, being first duly *sown*, was examined by Mr. Cary Tabb, and testified as follows:

1. What is your business?

A. Sale-man for the Whitesides Baking Co.?

2. Where do you live?

402 A. #2024 Murray Avenue, Louisville, Kentucky.

3. Were you ever connected with the Ewald Iron Company?

A. I was.

4. About when?

A. As near as I can remember it, from, let's see, it was in the early part of the year, 1907, until March or April of the following year.

5. Whereabouts did you work for that company?

A. At their plant here in Louisville on Clay street.

6. What was your business position with them?

A. Bookkeeper.

7. I will ask you who were the stockholders of the Ewald Iron Company at that time, do you know?

A. No one besides Mr. L. P. Ewald.

A. Mr. L. P. Ewald?

A. Yes.

9. Who was the President of the concern?

A. Mr. L. P. Ewald was the sole owner of the concern.

10. Do you know the officers of the company, were there any officers that you know of?

A. Officer, no sir.

11. Who managed and controlled the company?

A. Mr. L. P. Ewald, did.

12. Who controlled the St. Louis office of the Ewald Iron Company?

403 Objected to by Mr. Crawford.

13. Do you know who controlled the St. Louis office of the Ewald Iron Company?

A. As far as I know, Mr. L. P. Ewald did.

14. On what do you base that statement, Mr. Maratta, what knowledge?

A. Well from the fact that directions were telephoned to the office here to be telephoned on at St. Louis.

15. How often?

A. That I couldn't say how often.

16. Once a week or once a month?

A. Sometimes twice a day and some times not more than once a week.

17. Was the Ewald Iron Company a Louisville or a St. Louis Company?

Objected to by Mr. Crawford.

18. I will ask you where the Home Office of the Ewald Iron Company was?

A. My understanding was that it always was in Louisville.

19. On what do you base that understanding?

A. From the fact that all of the material that was used was bought here and paid for here and shipped in here, the iron was manufactured here and shipped out of Louisville and as far as I know, all instructions with reference to the iron came from Louisville, the selling price, shipping and everything else.

20. From whom in Louisville?

404 A. From Mr. Ewald.

21. How was the material used in the manufacture of iron paid for?

A. It was paid for out of this office by check.

22. Who signed those checks.

A. Mr. Ewald.

23. On what bank in Louisville were they drawn?

A. On the Bank Kentucky.

24. How was the pay roll made up for the mill hands, how were they paid?

A. The pay roll was drawn in a lump sum from the bank here, and paid over to them.

25. Who signed the check to draw these funds?

A. Mr. Ewald.

26. Could you give us an idea of what the pay roll amounted to per week.

Objected to by Mr. Crawford.

A. It would vary greatly according to whether they were working full time or half time.

27. Say when they were working full time?

A. I don't believe at that time they ran full time in any week.

28. What would be the average pay roll while you were there?

Objected to by Mr. Crawford.

A. The average pay roll per week, when they would run as much as they ran when I was there, that was about three days, and as near as I can remember, it was about \$1200 or \$1500 a week.

405 29. Can you give us an estimate of what the other expenses of the mill and the office here would be per week.

Objected to by Mr. Crawford.

A. I could not estimate that from the fact that Mr. Ewald's, I suppose he called him his private Secretary, his salary was not paid through the office.

30. Who was that?

A. Mr. Leahy.

31. Outside of that, could you give us an estimate of the expenses of running the mill, for instance, raw material?

A. I could not tell you the raw material that was used per week, you might say that would be one third and the balance including the pay roll would be the other.

32. Per month, could state that?

A. There is no way in the world to state it without the books.

33. What other expenses would you say there were besides the mill hands, the cost of raw material, and Mr. Leahy's salary, here in Louisville?

Objected to by Mr. Crawford.

A. The office force, the Superintendent?

34. Who was the Superintendent?

A. Mr. Sills.

35. Do you know how much he made?

A. Yes I know how much he made.

36. Do you mind stating how much his salary was?

406 A. I do not care to state that.

37. I will ask you whether all the iron that was manufactured by the Ewald Iron Company was manufactured here in Louisville?

A. As far as I know it was.

38. Was any portion of that iron shipped from Louisville direct to the consumer or was it all shipped through St. Louis?

A. I think right smart of it was shipped direct to the consumer.

39. Now was all of the iron that was manufactured by the Louisville mill paid for through the St. Louis office, or was some of it paid for through Louisville?

Object- to by Mr. Crawford.

A. Some of it through the Louisville office.

40. What proportion of the shipments were paid for through the Louisville office?

A. I couldn't say what proportion, whatever shipment is charged direct to any concern on the books was paid for in Louisville, the St. Louis we had no record of.

41. Would you charge on your books all shipments where you made them direct to the consumer from Louisville?

A. As I remember it, some of the shipments made direct to the consumer were orders that came from St. Louis and these were charged to the St. Louis office as being shipped to whatever concern it was.

42. When the orders did not come from the St. Louis office
407 and you made shipments direct to the consumer, were those shipments paid for through the St. Louis office or directly here?

A. They were paid here as I remember it.

43. What did your Louisville books show, what profit?

Objected to by Mr. Crawford.

A. I do not care to state.

44. I do not mean the amount—I mean a record of what?

A. Well the books here showed the record of the entire business. Every transaction in dollars and cents that went through there.

45. Do you mean the Louisville books kept by you would show the profit made on iron manufactured in Louisville when sold through St. Louis to the consumer, or only the profit at which it was billed to St. Louis?

A. It only showed the profit.

46. What profit?

A. It only showed the profit between the manufacture and the billing to St. Louis.

47. That is what I am trying to get at—how would you find the

profit over and above the price at which it was billed to St. Louis when resold to the consumer?

A. That was only found out at the end of the year by the St. Louis branch rendering an account of the year's business to this office.

48. Did they render an account?

A. They did.

408 49. At what other office, if any, did the Ewald Iron Company transact business other than the Louisville office?

A. The only one that I know of was the St. Louis office.

50. What position did that office play in carrying on the business of the Ewald Iron Company?

Objected to by Mr. Crawford.

A. I don't know what you mean by that.

51. What class of business was done by that office as distinguished from the main office at Louisville?

A. Why this office, this was the manufacturing end of it, and the goods *was* manufactured here and shipped there. They did the major portion of the selling, the major portion of the orders received by the company were received there.

Cross-examination by Mr. Crawford:

52. When did you go with the Ewald Iron Company.

A. As near as I can remember, the early part of 1907.

53. What part of 1907?

A. March or April, I think.

54. You continued with that company until then?

A. Until the following year.

55. Prior to September, 1907, you saw no statement rendered to the company by the St. Louis office?

A. I did not.

By Mr. Crawford: I move that all of the testimony of this witness be excluded.

56. You say that you kept the books at the Louisville office?
409 A. Yes.

57. You had nothing to do with the books kept at the St. Louis office at all?

A. No.

58. I mean except in so far as the accounts on your books were shown by corresponding entries on the accounts in the St. Louis branch, as to dealings with that branch?

A. That is all.

59. Your books had nothing to show regarding the profit made at the St. Louis branch?

A. They did.

60. In what way?

A. By the statements rendered at the end of the year.

61. I suggest to you that I said prior to September, 1907—prior to that, you had not seen any such entry?

A. I had not.

62. Except the statements you have last mentioned, there was nothing shown on your books about these profits?

A. Nothing except the statements at the end of the years for which I was there.

63. As I understood you, this was the manufacturing plant at Louisville?

A. Yes.

64. And that you purchased the iron and paid for it at this office?

A. Yes.

410 65. And you manufactured that raw material into certain kinds of iron and sold it?

A. Yes.

66. And the part that you sold direct to the consumer you received the money for?

A. Yes.

67. And that part that you shipped to St. Louis was shipped at a given price?

A. Yes.

68. Your books of course would show merely the profit that was made on it?

A. Yes.

69. The selling price of the iron shipped to St. Louis does not show on the books actually kept by you?

A. No, with the exception of the statements rendered at the end of the year.

70. You had nothing to do with the money on deposit or the money made by the St. Louis Office?

A. No.

71. That is not shown on your books at all?

A. No.

72. And you do not know what they were personally?

A. No, sir.

73. Nobody else kept the books up there except you at the period that you speak of?

A. Another fellow made the entries in the time book.

411 74. I mean other than the time book.

A. No, sir.

75. How was the time book kept—it was merely a memorandum of the men in the mill, was it not?

A. Yes, sir.

76. You were the only bookkeeper?

A. I was the only one.

77. During the period that you were there?

A. Yes.

78. Your books which were all the books of the Louisville office, under your direction, show nothing about the St. Louis office at all?

A. Nothing.

79. Or about the St. Louis profit?

A. With the exception mentioned.

80. Do you know anything about, or did your books show anything about the purchase or sale of real estate in St. Louis?

A. I don't remember exactly whether they did or not.

81. These transactions were not conducted from your office, were they?

A. I couldn't say positively.

82. Referring to the Wabash property, for instance, do you not say that was purchased from this office?

A. Not that I remember of.

83. Or sold from this office?

A. Not that I remember of.

412 84. Your bank account was in the Bank of Kentucky?

A. Yes.

85. Mr. Ewald was the President of the concern?

A. Yes.

86. And of course the managing officer?

A. Yes.

87. You say that you do not know of any other officer of the company in the Louisville office?

A. No, sir.

88. Do you mean that you don't know or that there was none?

A. I don't think so.

89. Don't you know that there were officers of the company in St. Louis?

A. No, sir.

90. You mean that you don't know or do you say there was not?

A. If there was an officer, there was no record in this office, no one in charge of the office.

91. You don't know who the officer over there was, the man in charge?

A. I never heard; I don't know.

92. Do you know who the Secretary of the company was?

A. No, sir; if there was any such officer, I don't know it.

93. Do you know personally that Mr. Ewald was the owner of all the stock in the company?

A. I couldn't state positively.

Mr. Crawford moves that all the testimony of the witness on
413 this point be stricken out.

94. You spoke of the Home Office being here in Louisville; did you ever see the stationery of the St. Louis Office?

A. Yes, I have seen some of it.

95. That showed the office of the Ewald Iron works at St. Louis?

A. The Ewald Iron Company.

96. In what way do you say that the Home Office of the company is in Louisville; why do you say that?

A. Why do I say it was in Louisville?

97. Yes.

A. Well, because the company had its plant here, the plant was moved here from Lyon County.

98. You do not know that personally?

A. Yes.

99. How do you know that?

A. From the men connected with it in Lyon County, who moved up here; they told me about it personally.

Mr. Crawford moves to strike out this part of the witness' testimony.

100. I mean of your personal knowledge, not from hearsay, have you any personal knowledge that the plant was moved here from Lyon County?

A. No, sir.

101. You do not know that of your own personal knowledge?

414 A. I know that all of the material bought was bought from this office and shipped into this plant, and that the material was manufactured here and shipped out of here, and billed and charged to some one.

102. Don't you know as a matter of fact that a great amount of material was purchased in St. Louis that did not come into this office at all and had no dealings with this office?

A. I don't know.

103. You don't know whether that is true or not?

A. No, sir.

104. You simply have a personal knowledge on the subject?

A. None whatever.

105. You think that because of the material purchased in Louisville was paid for in Louisville that therefore this is the Home Office?

A. I think so.

106. And that is your reason for thinking so?

A. Everybody around there thought so.

107. I am not asking you what somebody else may have told you.

A. Nobody told me at all.

108. In am asking you to confine yourself to what you know, have you any other reason for assuming that this was the Home Office other than the material was bought here and paid for here?

A. Mr. Ewald was located here all of his checks were signed here and his business was directed here.

109. Have you any other reasons?

A. None, everybody believed that to be so.

110. How did you come to be a witness in this case?

415 A. At the request of the City Attorney.

111. You were not subpoenaed to come here?

A. No, sir.

By Mr. Tabb:

112. Who was the man in St. Louis who had charge there?

A. To the best of my knowledge, Mr. Arbuckle.

113. You were asked whether of your own personal knowledge you knew that Mr. Ewald owned all of the stock. I will ask you if during your entire connection with that concern as bookkeeper,

you ever heard of any other stockholder other than Mr. L. P. Ewald?

A. None.

114. What proportion, approximately speaking, did the iron that was shipped outside concerns from Louisville bear to the iron that was shipped to St. Louis.

A. I could not say, I do not know what part.

115. Would you say it was a greater or less amount?

A. I could not say.

By Mr. Crawford:

116. At any rate, the amount that was shipped direct was paid direct to you?

A. How is that?

117. All that was shipped from this branch office direct to the consumer was paid to this office?

A. Yes, I think this office got orders from St. Louis to ship direct to some concerns, that was billed back to St. Louis.

416 118. I mean, all that you billed direct was paid direct at this office?

A. As I remember it, all that we received orders for here and shipped to the consumer, was paid for here, and billed from here.

119. Wasn't there a good deal of that?

A. Well comparatively I would say there was not, not in the year I was there, that was the year of the panic, and business was quiet.

120. It was quiet both here and in St. Louis?

A. I don't know about St. Louis.

121. You were not connected with the St. Louis Branch of the Ewald Iron Company?

A. No, sir, I do not know anything about it except the report of the business done.

122. You personally know nothing of that business, do you?

A. No.

123. Or how much business they did?

A. Nothing except the reports that were sent in here.

124. Was Mr. Ewald in St. Louis much, do you know?

A. I couldn't say.

125. Do you know how much of his time he gave to that office?

A. I couldn't say.

126. Have you any idea?

A. I do not know that he gave it any.

127. He was in good health that year, was he not?

417 A. I couldn't say, I didn't see him.

128. Did you never see him at all?

A. I never laid my eyes on him.

129. You never have seen Mr. Ewald?

A. No sir.

By Mr. Tabb:

130. Who employed you, Mr. Maratta?

A. Mr. Leahy.

131. What position did he hold with the Ewald Iron Company?

A. I don't know what his official title was, he simply transacted the business in the office for Mr. Ewald.

By Mr. Crawford:

132. Then somebody else had authority besides Mr. Ewald to employ you?

A. I presume somebody had authority to employ me.

133. You don't know what authority the people in St. Louis had, do you?

A. No sir.

134. You don't know how much authority they had?

A. No sir.

135. You say you never saw Mr. Ewald up there at the plant?

A. I never did.

136. Then why do you say that Mr. Ewald ran things up there?

A. Because he gave directions and they were followed implicitly.

418 137. Did he ever give any to you?

A. No sir, they were telephoned.

138. Did he telephone to you?

A. Never.

139. How do you know that they were telephoned in?

A. Because the others said he did, he gave orders for what he wanted done.

140. But you never got any telephone order from him?

A. No sir.

141. You never got any orders direct?

A. No sir.

I move that this testimony be stricken out.

By Mr. Tabb:

142. I will ask you whether your duties as bookkeeper required you to give any orders or have anything to do with reference to the managing of the plant?

A. No sir.

143. I will ask you how the orders were conveyed from Mr. Ewald to the office or information gotten back to him?

A. By Mr. Leahy, he did all the telephoning.

Reading and signature waived.

Adjourned to Saturday, April 26th, at 8:30 A. M.

419 Met on Saturday, April 26th, 1913, pursuant to adjournment, and proceeded to take the deposition of Mr. HERBERT S. MARSHALL. Mr. Marshall, being first duly sworn was examined by Mr. Chevalier and testified as follows:

1. Where do you live and what is your business?

A. #824 S. Seventh street, Louisville, Kentucky, night watchman at the Hope Worsted Mills.

2. Were you ever employed by the Ewald Iron Company?

A. Yes.

3. Please state between what years you were employed by that company?

A. From the latter part of January, 1886, to December 17th, 1907.

4. You were with that Company then during the years 1903, 1904, 1905, 1906 and 1907?

A. Yes, until December 17th, 1907.

5. Did you know L. P. Ewald, the President of that company during that time?

A. Yes.

6. What was your position for the company?

A. First I started in as stenographer, and went through the office work and wound up with the bookkeeper.

7. During the years, 1903, 1904, 1905, 1906 and 1907, in what capacity were you employed?

A. In 1903 and 1904 as stenographer and shipping clerk, 420 in 1905, 1906, and 1907 as bookkeeper.

8. Were you employed here or in St. Louis?

A. Here in Louisville?

9. What were your duties under these two forms of employment?

A. As stenographer, to answer the letters of the company, to attend to the shipping of material as shipping clerk and to attend to the books as bookkeeper.

10. Did these employments enable you to become familiar with the methods of business that was conducted there?

A. Yes.

11. Were you in a position to determine by your employment who had the control and management of the business?

A. Yes.

12. Were you in a position from your employment to state who had the chief control and authority of the business in St. Louis as well as in Louisville?

A. There was only one man handling both offices.

13. Were you ever in St. Louis?

A. No sir.

14. During the years that I have mentioned, how often as far as you know, did Mr. Ewald go to St. Louis?

A. Well, in the years 1905, 1906, 1907 he didn't go to St. Louis at all, before that he used to go once a month for a day or so at a time.

15. Please state what was his method of keeping in touch 421 with his business and managing the business of the company?

A. By long distance telephone, twice a day, and oftener if necessary, the first, about 2 or 2.30 and the last call about 5.30, before we left the office.

16. How would they communicate with him from the St. Louis branch?

A. They would write and use the long distance telephone, or telegraph him. In the morning, of course the regular mail would come from the night before, that would be submitted in the morning.

17. Was that the regular course, the daily course of business?

A. Yes.

18. Were you able from your position to determine who controlled both branches of the business or who had charge of them?

A. Yes sir, Mr. L. P. Ewald?

19. Just state on what you base your conclusion, what facts?

A. There were no deals closed or anything about the office unless it was first referred to him and he authorized it to go ahead.

20. Was that true of the transactions in St. Louis as well as Louisville?

A. Well now the transactions in St. Louis, as far as I know, the small matters, were taken care of by the man in charge of the St. Louis office.

21. From your personal knowledge, what transactions in St. Louis were controlled and directly passed upon by Mr. Ewald here in Louisville; what character of transactions as far as you know?

422 Objected to by Mr. Crawford.

A. When bar iron was to be bought, I know that much, that the specifications were drawn up in St. Louis and forwarded to Mr. L. P. Ewald, and that he bought it himself.

22. State whether or not Mr. L. P. Ewald had any control of the prices at which the iron would be sold to the customers?

A. He had full control of that.

23. Do you know who hired the salesman?

A. Mr. L. P. Ewald hired them.

24. Do you know whether the salesman reported to Mr. Ewald directly at the Louisville office?

A. Yes, when they were here.

25. Did he have any other office, do you know?

A. He had an office in Louisville, one in St. Louis, one in Chicago, and one in New York.

26. Did he or not keep in touch with those offices by telephone?

A. Yes, by long distance telephone.

27. Did he keep in touch with his salesmen?

A. Yes, he *keep* in close touch with the salesmen at all times.

28. Where was his office in Louisville?

A. At the office of the company at Clay and Fulton street, he did most of his work at the Galt House, and after he got so that he could not come out at all, he did his work at his residence at

423 Third and Breckenridge.

29. Are you familiar with both offices?

A. Yes.

30. How were they equipped with reference to telephone service?

A. At the Galt House he had the Cumberland and Home telephone and at his residence he had a place as large as this, I suppose that served as his office, and about six telephones.

31. At his residence?

A. Yes, at his residence.

32. Do you know what his monthly telephone bills amounts to approximately?

A. Well, his long distance business amounted to from \$150 to \$225 a month.

33. Is that for both the Home and the Cumberland telephone?

A. Yes.

34. Who was in charge of the St. Louis branch for Mr. Ewald?

A. There were three or four during the time that I worked there.

35. Who were they?

A. There was Mr. Herman.

36. What position did he hold?

A. Mr. Herman was Assistant Treasurer.

37. During what year?

A. I don't know exactly, I can't state positively what year.

38. Who else was there?

A. Mr. J. P. Sweeney was Secretary.

39. Who else?

A. Mr. Arbuckle was Assistant Treasurer, they followed in rotation.

40. When was Mr. Arbuckle with the company?

A. He is still with the company.

41. When did he begin with the company?

A. Mr. Arbuckle was with the company during the time that these other two men were there, as bookkeeper then.

42. How many men altogether were employed in the St. Louis office if you know?

A. I do not know. I had not been there enough to know, but from the conversation, I would judge that there were six or seven men.

43. You do not know personally?

A. I do not.

44. How many employes were there here?

A. Well, the number of men employed in the mill was something like 60 or 70, that were paid straight from the office. All the puddlers, heaters and rollers, men like that, would have two, four or five men under them, which would make the men working there, from 175 to 200, when the capacity of the mill was running.

45. Do you know of your own knowledge as bookkeeper of the company to what the expenses of the Louisville office, including the mill, amounted to, by the week or month?

Objected to by Mr. Crawford.

A. About \$25,000 a month.

46. That was the Louisville office?

A. The Louisville office, the pay roll, the material bought here in Louisville, the material bought, that is scrap iron, bought at other points, that is the rough goods. You understand that is just a guess, as near as I can come to it, I haven't seen the books of the Ewald Iron Company for years.

47. How were these expenses paid?

A. By check, the expenses for material, and cash for wages.

48. Do you know who signed the checks which paid the expenses?

A. Mr. L. P. Ewald.

49. And the bills of the Iron Company?

A. Mr. L. P. Ewald.

50. On what bank were these checks drawn?

A. They were drawn on the National Bank of Kentucky.

51. Do you know how the expenses of the St. Louis branch were paid?

A. By check, that is the small expenses were paid, and the checks would come from St. Louis for Mr. Ewald to sign, and the large bills were paid by checks through him. The Assistant Treasurer also had a cash amount at the office to pay cash for these things.

52. I understand you then that Mr. Ewald signed all of the checks?

A. Yes.

53. Where was the money in St. Louis, the proceeds of the sale, on deposit?

A. Deposited in the Franklin Bank.

54. What other bank in St. Louis?

A. The Fourth National Bank, the State National Bank, and Boatman's Bank.

55. How was that money gotten from St. Louis to Louisville to pay for material and expenses here?

A. Once a week the St. Louis office would send over a regular pay roll check of \$2,500, then if more was needed, for expenses above that money, Mr. Ewald added amounts as they were needed. You are speaking of the St. Louis expenses?

56. I am talking to you about the local office, how would they get the money from St. Louis?

A. They would get it as we needed it.

57. Do you know how much of the money in the Savings Bank—first, do you know which was the active checking bank in St. Louis?

A. The Franklin Bank, the company drew practically all of its checks on it.

58. Do you know what amount of money was deposited in the various banks in St. Louis?

A. In the four banks.

59. Yes.

A. About \$2,000,000 when I left.

60. What year was that?

A. In 1907, \$2,000,000 or better.

Objected to by Mr. Crawford.

61. Do you know the years previous I have mentioned, from 1903 on?

A. From 1903, on, I do not.

62. How much do you know was on deposit usually in the Franklin Bank?

A. They kept an account there that averaged about \$250,000.

63. Do you know personally who were the stockholders of the company during the years I have mentioned?

A. The only other stockholder that I really knew was Dr. Shaver and he left and sold out.

64. When did he leave?

A. I can't state positively, I do not know.

65. Did he leave before or after 1903?

A. That, I am not positive of. It was before 1903.

66. What office did he hold?

A. Secretary.

67. What did he do with his stock?

A. He converted it to Mr. Ewald, sold it and then went away.

68. Did you ever hear of any other stockholder in the company?

428 A. No sir, I did not.

69. From your personal relations with Mr. Ewald during these years, would you have heard of any stockholder if there had been any?

Objected — by Mr. Crawford.

A. Yes.

70. How close was your relationship to Mr. Ewald during these years?

A. I guess in the last three years, I was with him closer than any other man in the City of Louisville, I saw him oftener.

71. How often did you see him?

A. In the last three years, once a day, not less than once a day, and sometimes as much as three times a day.

72. Where was the iron manufactured that was sold to the St. Louis Branch?

A. It was manufactured here in Louisville by the Ewald Iron Company.

73. Was there any other iron sold that was not manufactured here?

A. Yes, some common iron, some tank steel, sheet steel, that we carried as a kind of accommodation for customers buying the best grade of iron, who would call for bar iron, just common iron, and we carried that as an accommodation to supplement the better grade of iron which Mr. Ewald made.

74. Did that represent any large part of the business, this
429 accommodation iron?

A. No, sir, a very small part.

75. How was the iron manufactured in Louisville, billed when sold?

A. It was billed to the St. Louis office but shipped right to the customer from Louisville. The iron was shipped right to the customer but was billed to the St. Louis office, and they as a collecting agency, collected for what the Louisville plant sold. On less than carload shipments, we would send a full car to St. Louis so as to get the benefit of the rates and then the St. Louis office would rehandle it and make shipments over the different roads west of St. Louis.

76. What would you say then was the reason or advantage for having the office in St. Louis?

Objected to by Mr. Crawford.

A. On account of the rehandling, the Ewald Iron Company, most of its business was done west of St. Louis, and the freight rates from Louisville to St. Louis was much less on carload lots than we could ship the small shipments from here, and so we usually filled the car to St. Louis and then let the St. Louis office rehandle it.

77. From your connection with the company and Mr. Ewald, are you able to say what was generally regarded as the chief office of the company, the main office of the company?

Objected to by Mr. Crawford.

A. Louisville was the main office.

430 78. Was Louisville regarded as the Home office of the Company?

A. Yes, sir, on account of its President and General Manager being here all the time, and all the business was done here—most of the business was done from here.

79. Do you know whether or not Mr. Ewald had any other investments of stocks in financial institutions than his interest in the Ewald Iron Company?

Objected to by Mr. Crawford?

A. He had some stock.

80. In what company?

A. The Helmberger Forge & Rolling Mill Company.

81. During what year was that, do you know, that he purchased this stock?

A. I know positively that he had it in 1905, 1906, 1907, before that, I don't know.

82. You don't know whether he had it in 1903, 1904?

A. I can't say positively when he bought that stock.

83. How do you know he had the stock?

A. On account of the check that used to come for his dividends.

84. Were these dividends always paid to Mr. Ewald here in Louisville?

A. Yes.

431 85. How were the checks made, to Mr. Ewald or the Ewald Iron Company?

A. L. P. Ewald.

86. What did he do with those checks?

A. He endorsed them to the Ewald Iron Company and sent them to St. Louis for deposit and they gave Mr. Ewald's personal account credit.

87. How were they deposited?

A. Under the name of the Ewald Iron Company.

88. Do you know what the dividends amounted to per year?

A. Yes, I do know.

89. Could you by examining your memoranda give the stenographer later on the amount?

A. Yes.

90. Will you do that?

A. Yes. It was \$325 quarterly.

91. Do you know whether or not Mr. Ewald received any rents or other income from any other source?

A. Yes, he received rents from some property he had, he received the rent every month from that property in St. Louis.

92. Do you know the amount, the monthly amount of rents that he received?

A. Yes, \$525 a month.

93. How was that money so received deposited?

A. I think J. W. Francisco, the real estate people in St. Louis, sent their check and it was endorsed to the Ewald Iron Company, and deposited to his personal account with the Ewald Iron Company.

94. During what year was that?

A. 1903, 1904, 1905, 1906, 1907 that I know of.

95. During those years, did it amount to about the same figure?

A. Just about the same figures, yes.

96. Do you know what that stock was worth in the Helmberger Forge & Rolling Mill Company?

Objected to by Mr. Crawford.

A. It was worth 280 in 1906 and 1907.

97. On what do you base your statement?

A. Why on the statement that Mr. Ewald made to me one time, that it was worth 3 to 1.

98. Do you know whether or not he was offered that for it?

A. Yes, he was offered that for it.

99. Did he refuse to sell at that price?

A. Yes.

100. By 280 you mean \$280 per share of the par value of \$100?

A. Yes.

101. How many shares did he have?

A. One hundred shares.

102. Were you with Mr. Ewald when the offices of the company were moved from Lyon County to Louisville?

A. No sir.

103. Do you know from any information that you got subsequently from Mr. Ewald, whether or not the business as conducted in Lyon County was a financial success?

A. As to whether or not it was a financial success, I can't say. The reason that Mr. Ewald gave for moving to Louisville was the hard matter of getting raw material and also shipping raw material to Lyon County and from Lyon County, and that he wanted to get to a railroad center.

104. How did you get that information.

A. Mr. Ewald himself made those remarks in one of his talks to me.

105. Did Mr. Ewald ever mention or give any intimation on his part while you were with him that he was going back to Lyon County?

A. None whatever.

106. Did he ever say anything to indicate an intention to the contrary?

A. No sir, he did not.

107. He never discussed it one way or the other?

A. No sir.

108. I understood you to say, Mr. Marshall, that in the latter years you were with Mr. Ewald, he was in bad health, during those years, did he or not still continue to run the company as he had done before?

434 A. Yes.

109. His health did not prevent his retaining the active management of the company?

A. No sir.

110. Do you know as bookkeeper of the company, whether or not monthly or yearly reports were remitted to the office in Louisville or to Mr. Ewald by the St. Louis office, showing their sales?

A. Yes, at the end of every fiscal year, the last of June, the last day of June—they would send in reports.

111. As I understand it, the iron was billed to St. Louis at a certain price, is that correct?

A. Yes.

112. Did the St. Louis office, when they sold iron, remit to the Louisville office the price that was obtained?

A. No sir, the St. Louis office sent to the Louisville office money as we needed it. They did not cover certain bills, certain shipments.

Adjourned to 11 o'clock A. M. for cross examination by Mr. Crawford.

Cross-examination by Mr. Crawford:

113. Mr. Ewald was President of the Ewald Iron Company?

A. Yes.

114. He was also Treasurer?

435 A. Yes.

115. Therefore, it was perfectly proper that he should sign the checks of the company, was it not?

A. Yes sir.

116. That of itself, did not necessarily indicate where the Home office or principal office of the company was?

A. Mr. Ewald was the President and General Manager.

117. And he was the Treasurer?

A. Yes, he had the three titles.

118. As far as the incorporation of this concern, it simply provided for a President, Treasurer and Secretary?

A. The corporation papers, I don't know anything about that at all.

119. You don't know anything about those?

A. About the corporation papers, no, sir, not a thing.

120. Mr. Ewald spent considerable of his time here in Louisville?
A. Practically all of his time.

121. Didn't he also spend a good deal of his time in St. Louis?

A. Very little during the time I was with him.

122. What years do you refer to now?

A. After the World's Fair, he wasn't in St. Louis three times, from 1904, to my knowledge.

123. Prior to that time?

435 A. He went over there about once a month for one of two days at a time.

124. Did he ever stay as long as a week?

A. Once in a while, Yes.

125. Did he ever stay as long as two weeks?

A. Not to my knowledge.

126. The Ewald Iron Company was in active business in St. Louis before it came to Louisville at all, was it not?

A. I don't know sir.

127. It was in active business in Lyon County before it came to Louisville?

A. Yes, I understand it was.

128. How many employes were there in the office of Louisville as distinguished from the mill?

A. Six.

129. No greater number than in St. Louis?

A. No sir.

130. The fact is that the St. Louis office employed more clerical help than the Louisville office?

A. I can't state that because I am not positive, the St. Louis office employed—my knowledge is from hearsay, eight or nine men.

131. As far as you were concerned, the St. Louis office was a wholly different concern?

A. No sir.

437 132. Other than having the same name, and doing business with your company?

A. No sir.

133. You were not familiar with the management of that business or with the salaries paid?

A. No sir.

134. Those were things that did not come within your jurisdiction?

A. No, sir.

135. And are not shown upon your books?

A. No sir.

136. That part of their business was done separate and apart from your business?

A. Yes.

137. They were entirely different businesses except that they both belonged to the Ewald Iron Company.

A. Yes.

138. And you billed the goods to them the same as you would to any other corporation?

A. We practically billed everything to them.

139. I say, just the same as you would to any other corporation or selling agent—just the same as to any other corporation?

A. We had no instructions to bill to any other corporation, we did not bill to anybody else at all.

438 140. You do not catch my question—as a matter of fact, you sold certain goods that came through the St. Louis store, and some of it that you sold here in Louisville?

A. Yes.

141. You shipped certain good- without going through St. Louis at all?

A. Yes.

142. That was paid for directly to you?

A. Yes.

143. And that went on your books?

A. Yes.

144. The question I am asking you is, if it is not true that you dealt with the St. Louis office as if it was a general agency, just the same as you would with another corporation?

A. A selling agent, you see that would be different.

145. I understand, Mr. Marshall, both these concerns belonged to the Ewald Iron Company?

A. Yes.

146. I am asking you if you did not deal with them just the same as you would have if you were dealing with a concern other than the Ewald Iron Company, what was the difference?

A. At the end of each year, June 30th, the St. Louis office made a statement to us as to what they did.

147. For what period?

A. During the Fiscal year.

439 148. Other than that, your dealings with them were just the same as if you had been dealing with a separate concern?

A. I suppose so.

149. They employed their own men and paid them?

A. Yes.

150. The salesmen were paid their salaries and are shown on the books of the company here?

A. The salesmen were employed here.

151. Isn't it a fact that they were employed and paid in St. Louis?

A. They were paid in St. Louis, but employed by Mr. Ewald here in Louisville.

152. You don't know whether he employed any salesmen while he was in St. Louis?

A. I know that in a number of cases he employed them right down here at the Galt House.

153. And sent them to St. Louis?

A. They started out of Louisville.

154. You don't know whether he might not have employed them in St. Louis, while he was there?

A. Well, I understand that they were employed here.

155. They might have been employed in St. Louis, while Mr. Ewald was there?

440 A. Yes, I understand that.

156. But no salesmen were employed from this Louisville office?

A. Yes they were.

157. They could have been employed at the St. Louis office?

A. No, I know that the sales that were made were reported to the Ewald Iron Company here.

158. Did your books here show any payment of salaries to salesmen?

A. No, sir.

159. Then I asked you the question if any salesmen were in the employ of the Louisville Office of the Ewald Iron Company?

A. I know that the sales they made were reported to the Ewald Iron Company.

160. How many bookkeepers did you have here?

A. One at a time.

161. What other office force did you have?

A. A stenographer, shipping clerk, Superintendent, Mill Clerk—two mill clerks.

162. With the exception of the bookkeeper and the stenographer, all of these were employes of the mill?

A. No, sir.

163. Wasn't the Superintendent in charge of the mill?

A. Yes, sir.

441 164. And the shipping clerk had charge of the shipping of material?

A. He was shipping and billing clerk.

165. Of the mill?

A. Yes of the mill.

166. Who else did you have?

A. Receiving Clerk.

167. His duty was to receive goods that came to the mill?

A. No sir, he had to report to the office.

168. Repeat the question. (Question 167 read to the witness.)

A. Yes.

169. I again ask you the question with the exception of the bookkeeper, yourself, and the stenographer, if every other employe of the Louisville Office was not an employe of the Mill?

A. Yes.

170. That was not true of the St. Louis office?

A. No.

171. They had a general office in St. Louis?

A. Yes.

172. And they kept the general records there?

A. Yes.

173. You did not have general office records at this place?

A. No, the general office was at St. Louis.

174. Your books show nothing about the St. Louis business, other than the year's business reported to you from there?

442 A. Other than the usual statement rendered at the end of the fiscal year, that was the only thing we had on our books here.

175. Did your books here show the shipments that were made to St. Louis?

A. Our books showed the amount that we shipped from Louisville to any point in the United States, the shipments were then billed and made out to the St. Louis office.

176. They would be charged against the St. Louis office?

A. Yes.

177. That would be for any shipment that went out at their direction?

A. On their order yes sir.

178. And no charge would be made of such goods that you sold and received the money for here?

A. No sir.

179. That is no charge would be made against the St. Louis office?

A. No sir.

180. Mr. Ewald was the President of the concern and naturally he fixed the price for the sale of the goods of the concern?

A. Yes.

181. Do you think that is anything unusual for the President of a concern to do?

A. No sir.

443 182. Do you personally know anything about the deposits in the St. Louis banks except by the statements rendered you by that branch at the end of each year?

A. And statements were rendered from day to day of the daily cash balances.

183. From the St. Louis office?

A. Yes sir.

184. That is all that you know about it, by the statements made received here?

A. The St. Louis office gave Mr. Ewald a statement of the cash balance each day.

185. Not to you?

A. Well yes, at that time, I was doing Mr. Ewald's personal work, answering his letters, when he was not feeling well, I attended to them——

186. What character of man was Mr. Ewald?

A. He was a very high class man.

187. Was he a good business man?

A. Yes.

188. As long as you were up there, did he continue to do business in an intelligent way that an up to date active business man would use?

A. Yes.

189. Did you ever see anything wrong with him in any way?

A. Wrong?

190. Yes.

444 A. In what way?

191. Mentally.

A. I did not, nothing that I saw, I do not know anything about that.

192. You say that you never heard Mr. Ewald say that he did not intend to move back to Lyon County?

A. No sir, I did not.

193. You did hear him say, however, that his only reason from moving from Lyon County was because the transportation facilities were not what they ought to be?

A. They were not what they ought to be, and practically kept him broke all the time. He could not fill orders and could not get raw material, and on account of not getting material, had to keep the mill shut down.

194. Do you know who had active charge of the St. Louis office while you were here?

A. Yes, there were three or four men during the time I was here, Mr. Herman, Mr. Sweeney, Mr. Arbuckle, they were there during the time I was here.

195. Who had charge of that office?

A. They did in rotation, just as one was let out, another one would go in.

196. They bought goods there and sold goods that never came to the Louisville office at all?

A. Yes.

445 197. Have you any personal knowledge of how much that business consisted of?

A. None, my understanding is——

198. Never mind your understanding?

A. No, sir, I have not.

199. I asked you if you knew, just answer my questions, and then you can make any explanation you like. The question I asked you was, from you-own personal knowledge if you know what part of the business the purchase and sale of stuff, other than the iron made here, in St. Louis constituted?

A. It was very small. The specifications with reference to iron would come here——

200. I am asking you of your own personal knowledge, if you know, not what somebody else told you.

A. Now I am telling you, I saw the specifications of the railroads, specifying the common iron and the tank steel which would come here, and we were not in a position to make that kind of iron, Mr. Ewald only made the best iron, and he stopped making charcoal iron.

201. Now when was that?

A. That was, I am not sure, it was when the Tennessee Charcoal Blue Mine stopped in 1903, after that, he didn't make any common iron or tank steel and the St. Louis branch bought the stuff away from here.

202. Don't you know that they continuously bought stuff that did not come from this office from the company's organization in 1880, until now?

446 A. No, they bought some angle iron, and some "I" beams.

203. That had nothing to do with this office here?

A. As I say, we didn't make anything like that here, we didn't make common iron or tank steel.

204. I am speaking about these others things, what was that you said they bought, you spoke of buying some small quantity that did not come through this office, which you could not supply?

A. Yes.

205. You are attempting to refer to anything other than this business done in St. Louis?

A. No, sir.

206. When you stated on your direct examination that there were 60 or 70 men employed here, you referred to the mill?

A. Yes, to the mill, and each one of those men employed 3 or 4 men under him.

207. Those were all workers in the mill?

A. I said in the mill, yes sir.

208. They were paid here in Louisville?

A. Yes.

209. And that is shown on the Louisville books?

A. Yes.

210. The bank account was in the Bank of Kentucky?

A. Yes.

211. You spoke of being paid in lump sums at various
447 times whenever you needed money?

A. Yes.

212. And that money was brought here and deposited in the Bank of Kentucky?

A. Yes sir.

213. And then checked out from that bank?

A. Yes sir.

214. This money was credited to what account on the books of the company?

A. To the St. Louis store.

215. You had charges and credits against the St. Louis store on your books?

A. Yes.

216. Did Mr. Ewald have a personal account on the books?

A. Yes.

217. Did you charge him and credit him individually with any amounts?

A. Yes.

218. You spoke of some real estate and some rolling mill stock that Mr. Ewald had did you ever see that stock?

A. Do you mean the certificates?

219. Yes.

A. No sir.

220. Were they in St. Louis?

A. I couldn't tell you where they were.

448 221. He had them in a deposit box in St. Louis, did he not?

A. I don't know, sir, I don't know what he did with them.

222. This rent that he received that you have referred to, that was from property that he owned in St. Louis?

A. Yes.

223. That was remitted to him here?

A. Yes.

224. And that money was deposited to his credit?

A. It was endorsed to the Ewald Iron Company.

225. And credited to Mr. Ewald's account?

A. His personal account.

226. You don't know whether his account on the books was square or not?

A. I don't know anything about it.

227. Whenever he would draw, that would be charged on the books?

A. Yes.

228. He drew from the funds with reference to any specific deposit?

A. Yes.

229. And he was charged without reference to any particular deposit?

A. You are talking now about his personal account?

230. His personal account.

A. His personal account, none of us knew anything about that, only that Mr. Ewald would draw on his personal account.

449 231. You don't know what the condition of his personal account was?

A. No sir.

232. His personal account was here?

A. Yes.

233. But you don't know its condition?

A. No sir.

234. You had some trouble up there?

A. Yes.

235. Why did you quit?

A. Sir.

236. Why did you leave their employ?

A. I was let out.

237. Why were you let out?

Objected to by Mr. Chevalier, unless it goes to the truth and veracity of the witness.

238. You were Mr. Ewald's confidential man, I believe?

A. Yes.

239. And you have been testifying to matters that you got in that relation?

A. Yes.

240. I will ask you if it is not a fact that you were let out from your employment because of peculations?

Objected to by Mr. Chevalier, who instructs the witness not to answer.

450 By Mr. Chevalier:

241. Mr. Crawford had asked you about salesmen having been paid from St. Louis, I will ask you whether or not they reported to Mr. Ewald personally, or otherwise, in Louisville to you- knowledge?

A. They reported personally to Mr. Ewald the salesmen did.

242. Can you give us the names of any of these salesmen?

A. Yes, Mr. B. D. Stafford, S. F. Sullivan, H. W. Pace, George Thompson, and many others that I can't remember. There were four or five others, I have been away from there such a length of time that I don't remember the names, but those I know, I used to meet them at the Galt House.

243. The time which you speak of covers what years, with reference to the salesmen?

A. From about 1900 until the time that I was let out.

244. Mr. Crawford asked you about other employes here in the mill of which you said there were fifty or sixty, now who employed those men?

A. Mr. A. J. Sills the Manager.

245. Do you know whether or not Mr. Sills reported to or was under the direction of Mr. Ewald in the matter of employing men of that sort?

A. Yes, everything was reported to Mr. Ewald before a man was employed, it didn't matter for what position, clerical, or in the mill.

246. Who did the firing of the men that you speak of, Mr.

451 Ewald or Mr. Sills?

A. The manager.

247. You have been asked to testify as to the sales of certain iron that was not manufactured in Louisville. State whether or not the profit made by the St. Louis office on such iron was included in the report sent back to the Louisville office?

A. The entire business, everything whatever, that the St. Louis office bought or sold, was included in this statement sent out at the end of the fiscal year.

248. What would be the yearly profit, what would it usually show?

A. I can't remember.

249. The yearly profit as to the time you were there?

A. Well, according to this statement, it usually showed in the last four years, an average of about one quarter of a million dollars.

250. You were asked about these deposits in St. Louis, do you know whether or not Mr. Ewald kept a personal account in any bank in St. Louis?

A. He had a personal account in Boatman's Bank.

251. Do you know how much it was?

A. No sir.

252. Do you know from anything that Mr. Ewald may have told you, or from your familiarity with the reports received by this office from St. Louis, whether the sales of this iron that was not manufactured in Louisville amounted to any great proportion of the business done?

452

Objected to by Mr. Crawford.

A. No sir, not at all.

253. Do I understand that all of the iron that was sold and billed from the Louisville office was paid for in St. Louis and the amounts of money so received were included in the statements made to your office here?

A. Yes.

254. Then did the St. Louis office remit to the Louisville office the money for which it was billed, the price of the iron that was shipped to St. Louis, in other words, was the iron billed to the St. Louis office at so much money?

A. Yes.

255. Would it then be charged on your books, and would you then receive from the St. Louis office the amount of that charge?

A. We received from the St. Louis office the amount of money from time to time.

256. In other words you did not deal with the St. Louis office as though they were the purchasers of these goods?

A. No sir.

257. Do you know what proportion of the goods manufactured and shipped from Louisville were paid, for in Louisville, in other words, how much of the total amount of sales of iron manufactured
453 in Louisville was paid for by checks received by the Louisville office direct from the purchaser?

A. It would not be \$50 per month.

258. A very small proportion?

A. Yes, when the plate mill stopped running there was nothing at all.

259. When did the plate mill discontinue?

A. Before 1900, I couldn't give you the exact date, if you will look up when the steel slat men got together and put up the prices of steel, it was about that time Mr. Ewald discontinued making plate or tank steel.

260. In answer to one of Mr. Crawford's questions, you attempted to answer I believe, and he interrupted you before you finished, as to these daily reports of cash on hand received by you, I wish you would just explain what these reports were?

A. They would come to Mr. Ewald in a personal letter, from the bookkeeper over there, and the envelopes would be addressed L. P. Ewald, President, and as Secretary, I answered the letters when Mr. Ewald was not well, he would give me the order, he would simply say "there is a letter," and I would read it to him, some times he would be leaning back in a reclining chair, some times lying down as the case might be, and he would tell me what to answer, some times by letter and some times by telephone.

454 261. Did you receive such reports during the year 1900 and up to and including 1907?

A. No sir, not as early as 1900, I was not Mr. Ewald's confidential man then.

262. Well what years do you refer to?

A. 1905, 1906, and 1907, I know about those.

263. From the time that you began to act in that capacity, did you receive such reports?

A. Mr. Ewald received them, and I saw them, yes.

264. Do you know whether or not he had been receiving them before that time?

A. Yes, he received them at all times.

265. I don't want to ask you for the amounts, but did these daily reports show the total deposits?

A. Yes.

266. In the various banks?

A. They did.

267. You have testified in answer to one of Mr. Crawford's questions as to the financial condition, I believe, of the venture or rather the success of the Lyon County operations, do you know through your relations with Mr. Ewald, whether or not money was made from the Lyon County operations, or whether he made it afterwards?

A. The money was made after the Lyon County operations.

268. On what do you base that statement?

A. On what Mr. Ewald told me, everything was bought coal, raw material and everything was bought and paid for by
455 notes and when I left him, he was discounting every bill he could get hold of. Every bill was discounted.

269. State why he paid that rather than pay cash?

A. State why he paid with notes?

270. Yes.

A. He did not have the money with which to pay, and he had to save back enough money to carry his pay roll from time to time.

271. That is money with which to pay the salaries?

A. Yes.

272. Did he ever say anything to indicate whether or not his operations in Lyon County were successful?

A. He mentioned it a time or two, that they were not successful, as I told Mr. Crawford, the reason why, was account of the lack of facilities for moving the products, the finished iron and the raw material.

By Mr. Crawford:

273. How old are you?

A. Thirty six.

274. Did I understand you to say that you did not charge these goods that were billed to the St. Louis branch as you would to any other customer?

A. That we did not charge them?

275. Yes.

456 A. We charged them to the St. Louis store, that is the way we charged them.

276. Didn't you charge them just exactly as you would have charged them, had you made a sale to a distinct and separate corporation?

A. No sir, because we charged them to the St. Louis store at a less price.

277. I am not asking you about the question of price, I am asking you about the practice?

A. We charged them less than anybody else, because I made out the bills.

278. You mean by that that you sold it at a price that was less than to any other corporation?

A. Yes.

279. Now I understand that, I am asking you otherwise, other than the question of price, if it was not exactly the same as if you were dealing, or the same kind of dealing that you would have had with a different corporation?

A. The only thing that I can say about that, there was a memorandum kept of what we had shipped to them.

280. And that was charged against the St. Louis office?

A. Yes.

281. You made a charge against them for everything that was shipped to them?

A. Yes.

282. You kept accurate books with them?

A. Yes.

283. And they sent you money?

A. Yes.

284. And the money they sent you was credited on your books to their account?

A. Yes.

285. Just exactly the same, irrespective of the question of profit or price, as if it had been sent to an entirely different corporation?

A. Yes.

286. By Mr. Chevalier: If you had charged this on your books to another corporation, you would have expected, and in all probability would have received the price back from that corporation?

A. We would have received a higher price, yes.

287. They would have sent back the amount—

A. From St. Louis?

288. I mean if you had sold to "A" & Company, or some other company, you would have expected to receive back from them payment for the iron you had sold?

A. Yes.

289. Did you expect to receive back from the St. Louis office a check for the iron which was billed and sent there at a certain price?

A. No sir, we just had a running account.

290. Then it was different than *you* if you had sold to another company?

A. Yes.

By Mr. Crawford:

291. While you had a running account, the account was paid, for instance, in 1906, if iron was shipped over there in 1904, the running account was paid?

A. Yes.

By Mr. Chevalier:

292. Do you know that this iron which was sold and billed to the St. Louis store was billed at a certain price, and sold at a higher price to the consumer?

A. Yes.

293. Did they retain the difference between your billing price and the price to the consumer and send you back the difference, or did they include that in the yearly reports that were sent here?

A. The entire amount for the sale of the shipments was included.

294. Do you know whether it was billed to the St. Louis store at the actual cost of making or at a profit?

A. At a profit.

459 295. And all that the St. Louis store ever remitted was the expenses of the Louisville store?

Objected to by Mr. Crawford.

A. Yes.

By Mr. Crawford:

296. Didn't I understand you to say that material here was billed to the St. Louis branch of the Ewald Iron Company, the iron was made at this mill and sold through the St. Louis branch at a profit?

A. Yes.

297. And that you charged the St. Louis branch with that selling price?

A. Our selling price.

298. To them?

A. Yes.

299. That selling price you say was lower than it would be to the consumer direct?

A. Yes.

300. As a matter of business, the selling price- to general sales agencies are lower than the selling price- to the consumer direct, are they not?

A. I have not had enough experience in that business to know.

301. You know whether it is customary or not?

460 A. Not to selling agents, no sir.

302. Then to the wholesaler?

A. Yes.

303. In other words, if sold direct, you would be selling to the consumer?

A. Yes.

304. And in selling to the St. Louis office, you would be selling as to a wholesaler who would in turn sell to the retailer or consumer?

A. To the selling agent.

305. Just as you call it?

A. Yes.

306. And they gave you credit on their books for the billing price to them?

A. Yes.

307. And you had an open account between the two companies?

A. Yes.

308. And they remitted to you irrespective of any particular shipment up to the open account?

A. Yes.

309. And you charged them up in the open account irrespective of any specific shipment?

A. Yes.

310. And their books exclusively showed the profit they made above the selling price to them?

461 A. Yes.

311. Your books did not show their profit except from the statements that you received at the end of the year?

A. The last day of June.

312. Their selling price and profit is not shown on your books?

A. Not until the end of the year, then they would be shown.

313. They would be shown as a credit to the St. Louis branch?

A. Yes.

314. These letters that you have spoken about were confidential letters, addressed to Mr. Ewald individually?

A. Yes.

315. Based upon confidential information gotten from St. Louis?

A. Yes.

316. And they had nothing to do with the firm business one way or the other, except in so far as that matter referred to firm business?

A. It was practically all firm business.

317. I am not asking you that, I am asking you if the letters from over there, from St. Louis branch, if such letters were not confidential communications, and if you did not get this information in your capacity as Mr. Ewald's confidential man?

462 A. Yes.

318. That is the way it was obtained?

A. Yes.

319. In that capacity?

A. Yes.

By Mr. Chevalier:

320. These reports that were made daily showed the deposits of the Ewald Iron Company?

A. Yes.

321. And stood in the name of the Ewald Iron Company in the St. Louis banks?

A. Yes.

Reading and signature waived.

463 Met by agreement on the 16th day of May, 1913, at the office of Gibson and Crawford, in the Realty Building, in Louisville, Kentucky, and proceeded to take the deposition of Mr. A. F. ARBUCKLE.

Mr. Arbuckle being first duly sworn, was examined by Mr. Cary Tabb, and testified as follows:—

1. You have come here in response to a subpœna duces tecum to produce the books of the Ewald Iron Company during the years 1904, 1905, 1906, 1907 and 1908?

A. Yes, and 1903.

Counsel for defendant states that Arbuckle is not the legal custodian of the books requested in the subpœna, and the books are not now in Mr. Arbuckle's possession, but counsel for defendant has no objection to having Mr. Arbuckle testify from the books and have him state the information desired, and suggested to him bring these books in response to their subpœna.

2. Have you those books?

A. Yes, they are right here.

3. What connection, if any, did you have with the Ewald Iron Company on September 1st, 1903?

A. I was their bookkeeper.

464 4. How long after that were you bookkeeper?

A. Well, up until I came here.

5. When did you come here?

A. In Feb'y 1910.

6. Are the books that you have here, the books which you kept as bookkeeper, of the Ewald Iron Company.

A. Yes.

7. Where were those books kept, in Louisville, or in St. Louis?

A. In St. Louis.

8. I will ask you to refer to these books, to the account of L. P. Ewald, on September 1st, 1903:

A. I will explain here that there were three separate accounts that were kept by me, one was his account as President of the Company, another his personal account, and the third was his private account. The President's account was the one to which we credited his salary as President of the Ewald Iron Company at the end of each fiscal year. The personal account shows the receipts from his property and money received on his stocks, all of which you might say were in St. Louis affairs, and all the property was situated in St. Louis.

9. Now, what about the private account?

465 A. I never knew exactly what that was, he just told me to charge different things to his private account. There were little bequests that he made to charity and other things like that that were chargeable to that account.

10. When he would make these bequests, would he draw on the Ewald Iron Company for money to pay the bequests and charge it to this private account that you speak of?

A. No, he never drew on the company. He would always make re-

quests of me to send a check to such and such a thing and tell me to charge it to such and such an account. It was always paid by the Ewald Iron Company's check of St. Louis.

11. That is how the check would be paid?

A. Yes.

12. Please refer to the personal account of Mr. Ewald on September 1st, 1903, and tell me what was the total of that personal account?

A. There was a debit balance of \$2,852.61.

13. That is he owed the Ewald Iron Company \$2,853.61 on September 1st, 1903?

A. Yes.

14. Do I understand that this account showed money received from property other than the Ewald Iron Company belonging to Mr. Ewald? That is stock, rent, etc.?

A. Yes, that was the debit balance, \$2,852.61.

15. He owed the Ewald Iron Company that amount of money?

466 A. Yes, on that special account.

16. As I understood you, this personal account was made up — money received from rents, dividends on stocks etc.?

A. Yes.

17. And bonds which belonged to Mr. Ewald personally and which had nothing to do with the Ewald Iron Company?

A. Nothing to do with the company whatever.

18. These moneys were turned over to the Ewald Iron Company?

A. Yes.

19. He was given credit for that on the books of the company?

A. He was given credit on the property and all repairs to the property and sundry amounts, all of which, of course, I could not tell you. He would ask to send him exchange, say for \$5,000 or \$10,000 sometimes to Louisville and to charge his personal account. I have sent him New York Exchange for that amount, and of course the purpose for which it was intended I do not know, I was directed simply to get that Exchange and send it to him and charge it to his personal account.

20. On September 1st, 1903, that account was overdrawn?

A. Yes.

467 21. Now take September 1st, 1904 what was the balance?

A. \$14,593.41.

22. Was that a debit or a credit?

A. It was a debit.

23. Do you mean that he owed the Ewald Iron Company on that day \$14,593.41 on his personal account?

A. Yes.

24. Now in looking at this personal account, I notice that you have on both side nothing but cash items?

A. Yes.

25. Is there any way by which you could state where that money came from?

A. Yes, it was for rental and money, checks sent him for the

rentals of his property and money received for rentals of his property and also interest on his stocks.

26. All of these items were rentals and interest on stocks?

A. Yes.

27. Did the company have any other books or accounts showing these items, that is, what stocks or property these amounts came from?

A. Well the cash book would show from whom it came.

468 28. The cash book?

A. Yes.

29. Where is that cash book?

A. I really could not tell you now, the books are so jumbled up, that is on account of the high water you know, that I really couldn't tell you where the cash books are now.

Counsel for defendant objects to the City going into the question of the individual items of Mr. Ewald's account. What he had on September 1st of each year, is the only question that is involved here.

By the Witness: They were all St. Louis investments.

30. The cash book of the Ewald Iron Company, was it sent here from St. Louis, after you left, do you know?

A. The cash book was sent over with the books. They were boxed up in such a way that it would take a long time to ferret them out.

31. What is this book that you have here now?

A. The ledger.

32. Did the ledger come along with the cash book?

A. No—well of course it was boxed with the others—yes—I don't know about that.

469 33. Has the Columbia Trust Company as far as you know, possession of all of these books other than this one?

A. The Ewald Iron Company is the custodian of the books.

34. Well leaving out the Ewald Iron Company?

A. Yes, they are in their possession.

35. What individual at the Ewald Iron Company is the custodian of the cash book of the old company?

A. The Columbia Trust Company would be the active custodian of them, but it is only through the authority of Mr. Gibson, who was a director of the company, that I have brought them here today.

36. He was a director in the Ewald Iron Company?

A. Yes.

37. Mr. Arbuckle, please refer to the account of Mr. Ewald, as of September 1st, 1903, and state the condition of that account?

A. There was a debit balance of \$28,114.75.

Counsel for the plaintiff, City of Louisville, asks what the items on the right hand side of the page are and the witness answers:—They are the amounts received to the credit of Mr. Ewald's accounts.

38. What was the amount of rents per month that Mr. Ewald received from his real estate?

- 470 A. He had quite a large lot of property.
39. That is not responsive to my question.

Objected to by Mr. Crawford, who instructs the witness not to answer.

By Mr. Crawford: Well, answer, if you like.

40. Repeat the question. What was the amount of the rents per month that Mr. Ewald received from his real estate?

A. That varied very much at times.

41. What was the average, would you say?

A. Do you want me to answer?

By Mr. Crawford: I don't mind.

By Witness: Well, one building that he had, he got \$335 per month rent for that.

42. What building was that?

A. The Western Union Building.

Mr. Crawford objects to each of these questions and answers.

The witness continues:—Then the commission houses, that varied there were about five of them, I guess, and he got about—well, I should say—well there — four of those—no—five—you see this has been four years ago.

43. I understand, refresh your recollection in any way that you can by looking at the books or anything else?

A. These commission houses, there were five or six, and he probably got \$100 a month rent from the commission houses,
471 may be more than that, I have forgotten. Then he had one house, a private house, he got \$125 a month for that.

44. That was the Westminster Court place?

A. Yes, that was rented for a time at that figure.

45. Could you say whether or not he owned this Westminster property and got \$325 a month for it prior to September 1st, 1903?

Objected to by Mr. Crawford.

A. I do not recollect when that was, I cannot say about that?

46. Do you know how long it was rented for that sum?

A. For years and years, I know.

47. Can you say whether it was rented for that sum as far back as 1903?

A. I think it was before that, some time before.

48. And from that time down until his death?

A. About a year before he died, that was about a year before he died.

49. He died, I believe, in July, 1909?

A. Yes, July 31st, 1909.

50. Now this house that he got \$125 a month for, fo you know how far back he commenced to get that rental?

A. I guess about three years, anyhow.

472 51. Three years before his death?

A. It began just prior—about a year before the World's Fair in St. Louis, and that was in 1904.

52. About that time he commenced to get \$125 a month for it?

A. Yes.

53. How long did that continue would you say?

A. I think about 4 years, anyhow 4 years or more.

54. You spoke of some commission houses?

A. Yes.

55. Do you know when he first started to get that rent for them, about when?

A. I don't recollect.

56. Can you give us any idea?

A. I don't know that, I didn't have anything to do with that, I cannot recollect.

57. Was there any other property that you know of, any real estate, from which he drew rent?

A. Yes, he had a valuable farm over near Belleville, Illinois.

58. What did that rent for, do you know?

A. It varied, several parties were on it, he got about \$200 a year.

473 59. Do you know about when that was, can you tell by reference to the books?

A. No, sir.

60. Do you know whether it was as far back as Sept. 1st, 1903, that that started?

A. He rented it before I went with him, that was in 1895. It was a family farm, it belonged to the family, it was his father's previous to belonging to him.

61. Then afterwards it belonged to Mr. Ewald?

A. Yes.

62. Do you know whether he rented that farm during all of that time?

A. Yes.

63. Was \$200 a year about the average rent?

A. Well, I think so, One year—a very little time—he got less rent than that. He rented it to an old party whom he had known long before. He rented it to him to take care of the place.

64. Do you know of any other real estate he collected rent from?

A. No, not that I know of.

474 65. Do you know when Mr. Ewald did buy this Helmbacher Forge Rolling Mill stock?

A. That was before my time.

66. Did he have it all the time that you were connected with the concern?

A. Yes.

67. Do you know how many shares he had?

A. I don't know anything about that.

68. Do you know what dividends he got from that stock per month or per year or per quarter?

A. I don't know anything about that.

69. Do you know how many shares of the Granby Mine & Smelting Company he had?

A. I don't know anything about that. He had that before I went there.

70. He got that before you went there?

A. Yes—these private matters he never divulged to me.

71. You know that he had this stock of the Granby Mining and Smelting Company, before you went there?

A. Yes, as far as I know, as far as I can recollect.

72. As far as you can recollect, did he have it all during your connection with the firm?

A. Yes.

475 73. Will you please turn to the President's account and tell me the amount that he had, or amount that stood to L. P. Ewald on September 1st, 1903?

A. There is a balance of \$5,978.12 to his credit.

74. On September 1st, 1904, what was the balance?

A. \$10,913.54 to his credit.

75. On September 1st, 1905?

A. \$15,832.81 to his credit.

76. On September 1st, 1906?

A. \$20,786.80.

77. On September 1st, 1907?

A. \$25,662.60.

78. As I understand it, this President's account is salary received by Mr. Ewald as President of the Ewald Iron Company?

A. Yes, all credits—that is all credits coming to him.

79. Now Mr. Arbuckle, I will ask you to turn to your books, to the accounts showing the balance on hand held by the Ewald Iron Company on September 1st, 1903?

A. What kind of balances?

Counsel for defendant calls attention to the facts that no subpoena was issued concerning any books of account of the Ewald Iron Company; further that the City of Louisville has refused to allow

476 the Assessors, who made the retrospective assessment sued on herein to testify as to whether or not the balances had by the Ewald Iron Company in banks in St. Louis formed any basis of the assessment herein, but nevertheless, counsel for defendant allows the witness to testify although it is apparently incompetent under the City's procedure.

80. I mean cash balances?

A. We had various balances, we carried cash for a checking account, I kept a cash account for a checking account, called the active account. We had sundry other accounts, permanent deposits on time and checking accounts?

81. You had different accounts?

A. Yes, we had two checking accounts, they were in the Franklin Bank, and the Fourth National Bank.

82. Those were the active accounts?

A. Yes, the active checking accounts.

83. What balances did you have in each of these banks on the 1st day of September?

A. I can give you the total, but I cannot give it to you separately.
84. Could you give it by reference to the books?

A. I would have to refer to the check book, I can give you the totals.

477 85. The total on deposit on September 1st, 1903?

A. Yes, there was in the two banks together on the 1st of September, 1903, \$349,829.47.

36. That is in the Franklin Bank and the Fourth National Bank?

A. Yes.

87. You had some other balances?

A. Yes.

88. What were they?

A. Now with the St. Louis Trust Company on September 1st, 1903, we had \$109,684.82. That was a time deposit.

89. What else?

A. We had certificates of deposit in the same bank.

90. What were they?

A. Certificates of deposit in the same bank, the Trust Company, of \$104,811.08. Then the State National Bank there was a cash deposit of \$102,594.05. In Boatman's Bank, we had \$75,390.84. Total cash and certificates of deposit was \$842,310.25 on the 1st day of September, 1903.

91. Now give us the same information as to September 1st, 1904?

A. The checking accounts were \$435,563.61. In the St. Louis Trust Company the cash deposit was \$111,529.68. Certificates of deposit \$107,955.41. In the State National Bank, cash deposits \$205,570.15. In the State National Bank and Boatman's Bank, \$178,333.24. Total as of September 1st, 1904, \$1,028,952.09.

478 92. Give us the same information as to September 1st, 1905?

A. The checking accounts were \$739,177.18. St. Louis Trust Company, cash on deposit \$113,779.19. Certificates of deposit in the St. Louis Trust Co. 111,193.94. State National Bank, cash deposits, \$209,718.30. Boatman's Bank, cash deposits, \$181,931.35. Total as of September 1st, 1905, \$1,355,799.96.

93. Now at 1906?

A. Checking accounts \$806,857.71. St. Louis Trust Company cash deposits \$116,462.00. St. Louis Trust Company, certificates of deposit \$114,529.90. State National Bank, cash deposit \$305,062.17. Boatman's bank cash deposit \$286,924.58. Total as of September 1st, 1906, \$1,629,836.36.

94. Now as to 1907?

A. The checking account was \$589,331.29. St. Louis Trust Company, cash on deposit \$220,853.38. St. Louis Trust Company, certificates of deposit \$117,965.80. State National Bank, cash deposits, \$414,132.64. Boatman's Bank, cash deposit \$395,121.37. Total as of September 1st, 1907, \$1,837,404.48.

95. Do you know whether or not Mr. Ewald had an individual account in Boatman's Bank in St. Louis?

A. I believe he did.

96. Did your books show anything about that account?

A. Nothing at all.

479 97. Do you know how much he had to his credit personally in Boatman's Bank?

A. I have no personal knowledge of that at all. That, I had nothing to do with.

Cross-examination by Mr. Crawford:

98. Mr. Tabb asked you about several balances of Mr. Ewald's up to September 1st, 1905, and you stated that there was in that year a debit balance of \$28,114.75. Look further in your book and state what was the balance on the 1st day of September, 1906? How much that was?

A. \$48,569.43 debit.

99. The next year, September 1st, 1907?

A. \$89,486.06, that is a debit.

100. Mr. Arbuckle, you testified that on the right side of that account were sums received from real estate, and stocks that Mr. Ewald had owned?

A. Yes.

101. Where was that real estate located—I did not mean specifically—I mean in what county and state?

A. That was in St. Louis County, in the City of St. Louis.

102. In the state of Missouri?

A. Yes, and then there was a farm, the farm was near Bellville, near Germantown, Illinois.

480 103. Were the rents from that property handled by an agent in St. Louis, Missouri?

A. The rental was handled by agents in St. Louis, with the exception of the farm in Illinois. That was paid in cash.

104. To whom?

A. That was before my time.

105. Say from 1903 to 1907?

A. It was given, I think, to Mr. Sweeney, and Mr. Sweeney, of course, handed it to me.

106. It was paid in St. Louis?

A. Yes.

107. The stocks and bonds that you have referred to, where were they?

A. They were kept in a safe.

108. Whereabouts?

A. In St. Louis.

109. Were they there during all of the period that you have testified to?

A. All of the time, they were never out of there.

110. They were there at the time of Mr. Ewald's death?

A. Yes.

111. And found there by his executor?

481 A. Yes.

112. You have referred to certain balances to the credit of the Ewald Iron Company, balances covering the years as of Septem-

ber 1st, 1903, 1904, 1905, 1906 and 1907, running from \$842,310.25 to \$1,837,401.48, were those balances permanently on deposit in St. Louis?

Objected to by Mr. Tabb on the ground that it is not responsive to anything brought out in the direct examination.

By Mr. Crawford:

113. Were these permanent deposits?

A. They were checking accounts, of course, they would not be called permanent accounts, with the Franklin Bank and with the Fourth National Bank, of course, they were checking accounts.

114. Were they kept there continuously?

A. The checking accounts were and there were deposits made from time to time.

115. Was there ever a time from September 1st, 1903, to September 1st, 1907, when the checking account did not have a great deal more money than was necessary for the current expenses of the company?

A. It was always more. I often advised Mr. Ewald to place more of it in certificates of deposit or some other securities to get interest on it. It was more than was necessary for the business.

482 116. It is not true that all of it except that which you actually checked out, was a permanent deposit covering the years that you speak of?

A. Yes.

117. And the certificates of deposit were also permanently deposited there?

A. Yes.

All of the foregoing questions and answers are objected to by Mr. Tabb on the ground that they are leading.

118. Do you know which part of the money showed in the total balances came from interest on certificates of deposit in these respective banks?

A. Yes, a greater portion of the increase arose from interest on certificates of deposit and cash deposited in these banks. I secured a very fine interest on these deposits.

119. Did the open checking account bear interest?

A. Yes, two per cent a month.

120. All of them?

A. Both of them.

121. By Mr. Tabb: Two per cent a month?

A. The account was balanced once a month, two per cent was the rate per annum.

122. I will ask you whether or not the amounts on deposit in St. Louis, the total of which you have given, were all the results of accumulations from the business passing through the books of the St. Louis branch of the Ewald Iron Company?

483 Objected to by Mr. Tabb unless Mr. Crawford wishes to make the witness his witness and objected to further because the question is leading and because it is not responsive to anything brought out on the direct examination.

123. Question 122 read to the witness?

A. Yes, sir.

124. Where was the chief office of the Ewald Iron Company?

A. St. Louis, Missouri.

Objected to by Mr. Tabb.

125. In what other towns did the Ewald Iron Company have agencies?

A. We had offices for a great many years in New York, and in Chicago.

126. What office did they report to?

A. To the St. Louis office.

127. Who paid the expenses of these offices?

A. The St. Louis office.

128. Where were the employes paid from.

A. From the head office, that was in St. Louis.

129. The Ewald Iron Company in St. Louis?

A. Yes.

130. Where were the traveling men employed?

A. All to my knowledge, from St. Louis. In fact they never came over here unless, to my knowledge, on one or two occasions.

484 131. To whom did they report?

A. To Mr. Ewald in St. Louis.

132. Where did they direct their letters?

A. Well not—a great many of them to St. Louis—I don't know of course, I haven't any knowledge of what happened away from there.

133. Where were they paid from?

A. They mailed them from the hotel and different places where they would be. Wherever they might be.

134. I mean from what office were they paid their salaries?

A. From St. Louis, and their expenses too.

By Mr. Tabb:

135. You have stated in substance that the money on deposit in St. Louis credited to the Ewald Iron Company on the respective dates mentioned was money that came through the St. Louis branch of the Ewald Iron Company?

A. From the St. Louis office, yes, sir.

136. On what do you base that statement?

A. Just on account of the sales that were made, naturally ... would get our remittances. All material was billed from the St. Louis office.

137. Didn't it come from Louisville?

A. Not all of it. We ran a general iron store, we bought material from the mills, from Pittsburg, and all over the country, South and

everywhere. We kept sheet, angles, steel, common bar iron, why they did not manufacture here at all.

138. All of the iron that you manufactured came from Louisville?

A. Well, I don't know, we billed it from St. Louis.

139. But all of the iron that was manufactured by the Ewald Iron Company was manufactured here in Louisville?

A. Yes, during that period.

140. Mr. Ewald was in Louisville a greater part of that time?

A. Yes, a greater part of the time. He came over there perhaps too, perhaps twice a week, once a week, he came there once or twice a week.

141. Of course you do not know what mail he got in Louisville?

A. What mail?

142. Yes.

A. No, sir.

143. You do not know when the salesmen came to Louisville to see him?

A. I have a pretty good idea. He never wanted them over here. There were only one or two occasions that I know of when the salesmen came here.

144. You mean you don't know if they were here?

A. I would have pretty good reason to know, because I had to write out the lists, and prepare the expense account, and naturally I would know where their time was spent.

145. He could very easily have had his salesmen come here without your knowing it?

A. No, I paid the expenses myself. It might have been, of course, but it would show on the expense account.

146-149. Unless he paid them himself?

A. Of course, if he paid them himself—I would know from the expense sheet—but he always made them arrange to come together to St. Louis. He made them come there together usually to go over and outline the business.

147. The Ewald Iron Company was a Kentucky corporation?

A. A Lyon County corporation.

148. Why do you say Lyon County?

A. That it where it was incorporated.

149. You mean the Articles of Incorporation of the Ewald Iron Company mention Lyon County?

A. Yes.

150. Do you know when their charter expired?

A. I do not know. I believe it had expired. I do now know when.

Reading and signature waived.

* * * * *

491 STATE OF KENTUCKY.

County of Jefferson:

I, Pauline Eckenroth, Official Stenographer, Jefferson Circuit Court, Chancery Branch, Second Division, certify that the foregoing

depositions of G. C. Maratta, Herbert S. Marshall, A. F. Arbuckle and C. E. Walker, were taken before me at the time and place and for the purpose in the caption stated; that the witnesses were first duly sworn to tell the truth, the whole truth and nothing but the truth, that the depositions were taken by me in shorthand and the foregoing is a true and correct transcript of my notes. Plaintiff was represented at the time by Mr. Cary Tabb and Mr. Stuart Chevalier, and the defendant by Mr. William Crawford and Mr. Charles H. Gibson. Reading of the depositions and signatures of the witnesses were waived by counsel. The said depositions were taken pursuant to order of reference entered in this action on the — day of —, 1913.

Witness my hand this 23rd day of June, 1913.

PAULINE ECKENROTH,

*Official Stenographer, Jefferson Circuit Court,
Chancery Branch, Second Division.*

Examined, approved and made a part of the record.

SAM'L B. KIRBY, *Judge.*

Fee \$36.40.

492 Jefferson Circuit Court, Chancery Branch, Second Division.

61955.

CITY OF LOUISVILLE, Plaintiff,

vs.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

The deposition of Louis Summers, taken on notice hereto attached, at the office of the clerk of the Jefferson Circuit Court, Court House, Louisville, Kentucky, on the 13th day of May, 1913, to be read as evidence on behalf of the defendant on the hearing of the above styled cause. At the taking plaintiff was represented by counsel George Cary Tabb and defendant was represented by counsel, William W. Crawford.

LOUIS SUMMERS, being first duly sworn, was examined by Mr Crawford and testified as follows:

493 1. Mr. Summers, will you give your name to the stenographer?

A. Louis Summers; Clerk of the Jefferson Circuit Court.

2. Prior to becoming Clerk of the Jefferson Circuit Court, what position did you hold?

A. I was Assessor for the City of Louisville.

3. On the 27th day of August, 1909, and November 22, 1910, were you the City Assessor for the City of Louisville?

A. I was in August, 1909, but not the latter date.

4. As City Assessor, it was your duty to make the assessments and retrospective assessments?

A. It was.

5. In August, 1909?

A. Yes, sir.

6. Was that duty imposed on anyone other than you?

A. No one but me; but of course deputies went out and made assessments in my name.

494 7. Did you make — C. C. Murphy was your deputy at that time?

A. My chief deputy.

8. Mr. Murphy testified that on information furnished by you, or directions given by you, he made a retrospective assessment against the Columbia Trust Company, executor of the estate of L. P. Ewald, deceased, on August 27th, 1909, covering the years 1904 and 1905, for a million dollars in each year. Did you give him those directions?

A. I am inclined to think I did if he says I did; I have no recollection of doing it at the present time because there is so much of that done that I have no recollection of any particular—any one case.

9. Did you ever make assessments of retrospective assessments without any information or knowledge whatever that the person assessed had any property?

A. I never made any such assessments unless based on some information that I received. In this case——

Mr. Tabb: I object to the witness making any statement as to what was done in this particular case.

495 A. In this particular case, involving the Ewald estate——

Mr. Tabb: I instruct you that it is not the duty of the Assessor to testify as to what information he had in any particular case.

Mr. Crawford: You cannot instruct him as to that.

Mr. Tabb: The bills have been made and are prima facie evidence and it is not the duty of the Assessor to state on what information they are based.

Mr. Crawford: We differ on that.

Mr. Tabb: We differ on that and it is a question on which I want a ruling of the Court. I will say this, Mr. Summer: You can refuse to answer the question at this time, under my instructions, "on advice of counsel" and you need not answer unless the Court rules you must.

A. I refuse to answer on advice of counsel.

Ruled by Commissioner that witness must answer.

Witness still persisting in refusal the question is certified to the Court.

496 Witness: It is not proper for the assessor to make retrospective assessments unless he has some information to base it upon; he could make retrospective assessments against everybody in the city of Louisville.

10. Mr. Summers, is it not a fact that when this retrospective assessment was made Mr. Ewald was dead?

A. I don't know.

11. Isn't it further true, Mr. Summers, that when this retrospective assessment was made by you it was made solely on the information that the Ewald Iron Company, a Kentucky corporation, had omitted listing for assessment certain money which that company had on deposit in St. Louis?

Mr. Tabb: I object to that and instruct the witness not to answer.

12. Will you state what that was based on?

A. That was objected to and I decline to answer.

13. I will ask you if it is not a fact that the assessment was based on the ownership of L. P. Ewald, personally, of stock in the Ewald Iron Company?

Mr. Tabb: That is objected to.

497 14. Do you know of any property, or did you on August 27, 1909, know of any property, Mr. Ewald had omitted for assessment?

A. I have no recollection; I don't recall at the present time——

15. Of knowing of any property he owned at that time?

A. Any personal property.

16. Do you know of any real estate, that was omitted from the assessment, that he owned at that time?

Mr. Tabb: That is objected to because the assessment is not against real estate; it is against personal property.

17. Do you know of any personalty that L. P. Ewald omitted for assessment for the years 1904 and 1905, retrospectively assessed?

A. I do not.

18. Up to the time you left office and even after you had made out the retrospective assessment, did you know of any property he owned?

A. I did.

19. Had you any information that he omitted any property from the assessments?

498 A. I had.

20. What was that?

By Mr. Tabb: That is objected to and I instruct the witness not to answer.

Met by agreement on June 6th, 1913, at the office of Mr. Louis Summers, in the Court House, in Louisville, Kentucky, and proceeded with the deposition of Mr. Summers.

By Mr. Crawford:

21. Mr. Summers, the Court has ruled in this case that the questions which were objected to by Mr. Tabb must be answered, one of them is question 9, which reads as follows:—

"Did you ever make assessments or retrospective assessments without any information or knowledge that the person assessed had any property," and you answered.

"I never made any such assessments unless based on some information that I received. In this case——"

Then you were stopped by Mr. Tabb's objection.

A. This is in reference to the estate of L. P. Ewald, is it?

22. Yes. Now I am going to get you to answer that question?

A. On a certain day, I don't remember the day, what day or what year it was, but Mr. Blakey, the City Attorney, came into my office in a big hurry and requested me to make a retrospective assessment against the estate of L. P. Ewald for a million dollars if I am not mistaken. He said "You issue a notice and when they come
499 to answer, notify me and I will be present to represent the City." On that information I made this retrospective assessment.

23. At that time the Ewald Iron Company had paid all of its assessment on property located in Jefferson County, had it not?

A. The records speak for themselves, the records show, I don't know whether they had paid it, or not.

24. Did you know of any property they had omitted?

A. Not of my own knowledge.

25. Did you know of any property at that time or do you now know of any property that L. P. Ewald had omitted?

A. I do not.

26. State whether or not the retrospective assessment that you made was merely at the request of the City Attorney, representing the City of Louisville?

A. Yes.

27. He did not give you any information at the time as to what it was to cover?

A. No sir, we never discussed it, he seemed to be in a hurry and just walked out.

28. Were you present when the Board of Equalization met?

A. I may have been—at what time?

29. On November 26th, 1909?

A. I don't know, I don't know whether I was in office then, the records would show whether I was then City Assessor. I
500 have no recollection of hearing this case, or what disposition was made of it.

By Mr. Tabb:

30. Mr. Summers, how many assessments do you have on your books approximately, or did you have at the time this assessment was made?

A. I couldn't answer that without looking at the record.

31. Have you any idea?

A. Not the slightest.

32. As many as ten thousand?

A. I don't know, the records would show, you can get that from the records in the office there, I don't know just how many it would

be, I think they make out in the neighborhood of 40,000 tax bills in a year.

33. Could you state positively you never had any information from any other source to the effect that L. P. Ewald had omitted property to the amount of one million dollars?

A. One million dollars?

34. Yes, on September 1st, 1903 and 1904, which had not been listed for taxation?

A. I had no other information as to his personal property.

35. I mean, can you state now positively that you had no other information than the information given you by the City Attorney?

501 A. I did not, I don't know to the best of my knowledge.

36. To the best of your knowledge?

A. Yes, I have no recollection of it.

37. You have no recollection about it?

A. No. I want to add to that, it comes to my mind now that for the year previous to that we had Mr. Ewald or had the Ewald Iron Company before the Board of Equalization for some omission, Mr. Ewald himself did not appear, I think he was there through his attorneys, Mr. Gibson, now what that was, I can't remember, but the records in the office will show that, you can find it there.

38. Was Mr. John Buechel in your office as Deputy Assessor at the time this retrospective assessment was made?

A. He was, during the whole of my administration.

39. How many deputies did you have in the office?

A. I think when I left, there were seven districts.

40. And one in each district?

A. One in each district, yes, whatever the legislative districts are, if there are eight, then I had eight deputies.

41. Can you state positively now that you never received any information from Mr. John Buechel to the effect that Mr. L. P. Ewald had omitted one million dollars?

A. I have no recollection of ever discussing the matter with him at all.

42. You have no recollection of it one way or the other?

502 A. I don't remember discussing it with him at all.

43. When did your term of office as City Assessor begin?

A. I think it was December, 1905.

44. December, 1905?

A. Yes.

45. Who was City Assessor previous to that time?

A. Mr. C. C. Murphy.

46. Whom did he succeed?

A. Mr. D. F. Murphy.

47. Who was City Assessor on September 1st, 1903, do you know?

A. I would have to look that up, I am not positive about that, I think Dan Murphy was, but I am not positive.

48. Do you remember whether or not you made out tax bills covering the retrospective assessments against the Ewald estate for the years 1904 and 1905?

A. I could not have made them out in 1904.

49. I am talking about the retrospective assessment?

A. You are speaking how many years back?

50. The retrospective assessments made in this instance went back five years?

A. Yes.

51. Who made out the bills?

503 A. I directed Mr. Murphy to make out the bills, he was in the office, a deputy in the office.

52. Did he make out the notices?

A. I instructed Mr. Murphy to get out the notices, I instructed him to give the notice and I suppose that he mailed it, I am satisfied that he followed my instructions.

53. Now Mr. Summers, you did not make out the bills after you sent out the notices, did you?

A. It is customary to make the entry on the books.

54. Did you make out the bills at the same time?

A. I don't know.

55. Don't you know that the law provides that it is necessary to send out a 30 day notice?

A. I will have to look it up and see, I know that he was very careful and he followed my instructions, if that's the law, then he did that.

56. You were Assessor for four years?

A. Yes, the full four years.

57. You were not the Assessor on November 26th, 1909, when complaint was made of this retrospective assessment which had been made for the years 1904 and 1905?

A. I don't know whether I was or not, I don't know whether the council had elected my successor or not.

58. Do you remember when your term of office expired?

A. I do not.

59. Do you remember what year it was, what time in the year, when Mr. Blakey came and spoke to you about this retrospective assessment?

504 A. I do not.

60. Could you say whether it was in the summer time or the winter time?

A. I would like to say I can't recollect it, it just passed out of my mind, I can't remember anything about it at all.

61. Have you any idea how many retrospective assessments you made out on an average in a year?

A. I can't remember that, the records will show.

62. Please state in a general way your custom in reference to making out retrospective assessments, what information you usually acted upon?

Objected to by Mr. Crawford.

A. We never made any retrospective assessment at all until we had information to do it upon. Frequently we found out where property was omitted in the office, real estate that had escaped taxation for

a couple of years, we ascertained that in some manner and made a retrospective assessment to cover it. In fact there never was during my administration as Assessor a retrospective assessment made in the office that was not based upon some information. In reference to this retrospective assessment made against the estate of L. P. Ewald, as I have just stated, the information that I received was from the City Attorney, who was representing the same interests that I was.

505 By Mr. Crawford:

63. The retrospective assessment against the estate of L. P. Ewald was the largest retrospective assessment that was ever made during your term of office, was it not?

A. I think so.

64. I was very large larger than any other than had ever been made?

A. Yes.

By Mr. Tabb:

65. Do you remember the amount of it?

A. No, I have tried to think, but I can't recollect just now, I could refresh my memory if I had the books before me.

66. The record speaks for itself?

A. Yes.

Reading and signature waived.

506 Jefferson Circuit Court, Chancery Branch, Second Division.

#61955.

CITY OF LOUISVILLE

vs.

COLUMBIA TRUST COMPANY, Executor of the Estate of L. P. Ewald,
Deceased, Defendant.

The deposition of Mr. Cornelius C. Murphy, taken pursuant to notice hereto attached, at the office of Messrs. Gibson & Crawford, in the Realty Building, in Louisville, Kentucky, on the 10th day of May, 1913; said deposition being taken as if under cross examination, and to be read as evidence on the hearing of the above styled cause.

Mr. MURPHY, being first duly sworn, was examined by Mr. Crawford, and testified as follows:

1. State your name, occupation and address?

A. Cornelius C. Murphy, Chief Deputy Assessor of the City of Louisville, residence, Louisville, Kentucky.

2. How long have you been Assistant City Assessor?

A. Ever since the creation of the office with the exception of about seven months.

3. As Assistant City Assessor, has it been your duty to
507 make assessments retrospectively—to make retrospective assessments acting for the Assessor?

A. Yes, under the instruction of the Assessor.

4. On the 27th day of August, 1909, were you Assistant Assessor of the City of Louisville?

A. Yes.

5. In making retrospective assessments,—you act here upon personal knowledge or information, do you not?

A. I act on the direction and orders of the Assessor.

6. Who furnished you with the information upon which you act?

A. The Assessor.

7. Who was the Assessor on the 27th day of August, 1909?

A. Mr. Louis Summers.

8. Did you on the 27th day of August, 1909, make a retrospective assessment against L. P. Ewald?

A. Mr. Summers made the retrospective assessment, and authorized me to send out notices to the Columbia Trust Company, and L. P. Ewald for assessment of personal property submitted for the years 1904 and 1905.

9. Mr. Louis Summers made the assessment, not you?

A. Not I, he made the assessment.

10. You merely executed that and made out the bills?

508 A. Yes—I did not make out the bills, I made out the notices and sent them out.

11. Did you have any personal knowledge or information upon which that assessment was made.

Objected to by Mr. Tabb.

A. I did not.

12. The information upon which you acted was given to you by the Assessor?

A. Yes.

13. Did he tell you upon what the assessment was made?

Objected to by Mr. Tabb.

A. No sir.

14. You personally knew nothing of what he was making the assessment at that time against L. P. Ewald?

A. I did not.

15. Do you now know of any personal property omitted by L. P. Ewald at that time?

Objected to by Mr. Tabb, and instructs the witness not to answer. The witness being directed to answer the question Mr. Tabb asks to have it certified to the Court for a ruling.

16. Did you make personally a retrospective assessment against the estate of L. P. Ewald for the City of Louisville?

509 A. I did not. Mr. John Buechel, the City Assessor, made it.

17. When was that?

A. I have a memorandum here, I cannot recollect the date.

I will look at that. It was November 22nd, 1910, when the notices were sent out, in accordance with the directions of the Assessor for the assessment for 1906, 1907, and 1908, and 1909.

18. At that time did you personally know of any property of L. P. Ewald, which was omitted from assessment?

Objected to by Mr. Tabb, who instructs the witness not to answer. The witness being directed to answer, declines to do so, and Mr. Tabb asks to have the questions certified to the Court for a ruling.

19. Isn't it a fact that on both dates when the retrospective assessments were made against the estate of L. P. Ewald that the property as covered or intended to be covered by the retrospective assessment, was money belonging to the Ewald Iron Company, which was on deposit in St. Louis?

Objected to by Mr. Tabb, who instructs the witness not to answer.

The witness being directed to answer, declines to do so, and Mr. Tabb, asks to have the question certified to the Court for a ruling.

20. Mr. Murphy, you were present before the Board of Equalization, representing the Assessor's Department, when the representatives of the Ewald Iron Company appeared to protest against the retrospective assessment, were you not?

A. Yes, I was present.

21. Isn't it a fact that on behalf of the city, it was urged that the assessment should stand because of the retrospective assessment against this property in St. Louis, belonging to the Ewald Iron Company?

Objected to by Mr. Tabb, on the ground that a record was taken of the proceedings and that counsel for defendant has a copy of them and they are the best evidence of the proceedings before that Board.

Mr. Tabb directs the witness not to answer.

The witness being instructed to answer, Mr. Tabb asks that the question be certified to the court.

22. Isn't it true that the only ground and basis for the retrospective assessment for the years 1903, 1904, 1905, 1906, and 1907, against the estate of L. P. Ewald was the information that the Assessor had gotten that the Ewald Iron Company had omitted from assessment money which it had on deposit in St. Louis?

Objected to by Mr. Tabb, who instructs the witness not to answer.

The witness being directed to answer, declines to do so, and the question is certified to the Court for a ruling.

511 Mr. Tabb also states that the year 1903 is not involved.

23. Isn't it true that the sole basis of the assessment against the estate of L. P. Ewald for omitted taxes covered by the retrospective assessment for the years 1904, 1905, 1906, 1907, was that as the Ewald Iron Company had omitted to assess money on deposit in St. Louis that stock of L. P. Ewald in the Ewald Iron Company was liable to Assessment?

Objected to by Mr. Tabb, who instructs the witness not to answer. The witness being directed to answer, declines to do so, and the question is certified to the Court for a ruling.

Further taking of depositions adjourned to Tuesday, May 13th, at 4 o'clock P. M. at the office of Gibson and Crawford.

Met by agreement on June 5th, 1913, and proceeded with the deposition of Mr. Murphy.

Examined by Mr. Crawford:

24. Mr. Murphy, the Court has ruled that you must answer the questions which have been objected to by Mr. Tabb. In your other deposition this question was asked you:

"15. Do you know of any personal property omitted by L. P. Ewald at that time." If you want to read a few questions back you can.

A. No, sir, I acted on information given me by the City Assessor, my superior officer, who authorized me to notify these people.

25. Did he give you any information at the time or did he simply tell you to make the retrospective assessment at such an amount?

A. To make the assessment for one million dollars, Mr. Summers said for one million dollars for five years, he gave me that amount, I don't know what it consisted of. As far as Mr. Buechel's term in office, he gave me the amount of \$2,150,000.00, and he asked me to scale it down from the one million dollars for five years, and I made the scale and made the assessment as \$1,250,000, that is, he made the assessment, that was for the first year.

26. For 1906?

A. Yes, and then there was a difference remaining between \$2,150,000 and \$1,250,000, leaving \$900,000 and I scaled that down \$300,000 for each year, making \$1,550,000 for 1917, \$1,850,000 for 1908 and I submitted those figures to Mr. Buechel and he authorized me to make the entries.

27. What were your figures of \$2,150,000 for?

A. Personal property, that is what Mr. Buechel told me.

28. What personal property was that?

A. I don't know, it was personal property.

29. I will ask you if it was not for cash in bank in St. Louis, to the credit of the Ewald Iron Company?

A. I don't know.

30. You say that Mr. Buechel gave you those figures?

A. Yes \$2,150,000.00, and he authorized me to scale it down, I don't know what it consisted of.

31. Were you present at the meeting of the Board of Equalization on November 26th, 1909?

A. I think I was on the stand at that time.

32. Isn't it a fact that at that time, Mr. Charles H. Gibson, for the Columbia Trust Company, executor of L. P. Ewald, asked to

have you testify before the Board as to what the assessment consisted of?

A. I think so.

33. And Mr. Blakey, City Attorney, refused to allow you to testify?

A. Yes.

34. Isn't it further true that the only question that was raised before the Board as to the retrospective assessments of L. P. Ewald grew out of money which was in bank in St. Louis to the credit of the Ewald Iron Company?

Objected to by Mr. Tabb on the ground that the report of the stenographer is the best evidence of what happened before the Board.

By Mr. Crawford: I have a right to bring it out in my own way.

By Mr. Tabb: You have the transcript there.

514 By Mr. Crawford: Yes.

By Mr. Tabb: Will you file it.

By Mr. Crawford: No.

By Mr. Crawford: Repeat the question. Question 34 read to the witness?

A. I can't say I don't remember.

35. Do you know of any other property, other than the money in the bank in St. Louis, that was mentioned or suggested that L. P. Ewald had omitted for assessment for the years named, other than that?

A. I don't remember, all the information I had was given me by the Assessor as to omitted property and I followed his instructions. I don't know what character of personal property was omitted.

36. I don't think you catch my question.—In this proceeding before the Board of Equalization I will ask you if it is not true that Mr. L. W. Botts, who was then the President of the Columbia Trust Company, executor of the Ewald estate, testified that he knew of no property of L. P. Ewald in Kentucky that was omitted from assessment, and that it was argued that as a stockholder of the Ewald Iron Company, the estate was liable for taxes on the money which that Company had on hand in St. Louis and your assessment was affirmed by the Board of Equalization upon that argument?

515 Objected to by Mr. Tabb, on the ground that Mr. Crawford has a copy of the proceedings before the Board of Equalization, which copy he is now holding in his hand, and that this transcript is the best evidence of the argument that was made before the Board of Equalization.

By the witness: I don't remember.

37. Do you now know of any property that L. P. Ewald had omitted from assessment for the years 1904, 1905, 1903, 1907, and 1908?

A. Not to my knowledge.

38. You do not know of any?

A. I know nothing about it.

39. Do you know of any property located in Jefferson County of

any kind which had the Ewald Iron Company omitted from assessment to the City of Louisville from the years 1904, 1905, 1906, 1907 and 1908?

A. Not to my knowledge.

40. Have you examined your records to see whether the Ewald Iron Company has paid its taxes for those years.

A. The Ewald Iron Company?

41. Yes.

A. They did pay, yes.

42. On all property know- to belong to them?

A. I can't answer that, I don't know whether they did or not, I know they prepared a schedule and turned it in, but just what it amounted to, I don't know, and whether they paid on all their property, I couldn't say.

516 43. Did you make a retrospective assessment under the direction of the City Assessor for the years 1904 and 1905 against the Ewald Iron Company?

A. I did not make the assessment, the Assessor made the assessment himself, he gave the amounts and instructed me to make out the tax bills.

43. And did he make the assessment?

A. I did not make the assessment, the Assessor made the assessment, he gave me the figures and authorized me to make out the tax bills.

44. I am speaking about the assessment for the year 1906, the retrospective assessment? The retrospective assessment made against the Ewald Iron Company in 1906, for the years 1904 and 1905, did you attend to the details of making that retrospective assessment?

A. I don't understand you—I fixed the assessment, is that what you mean?

45. I understood you to testify that you made this assessment

A. No, I didn't make the assessment, you don't understand, the assessment was made by the City Assessor and the amount was given to me and I was authorized to make out the tax bills, make out the notices of this retrospective assessment on the figures that he gave me, after the Board of Equalization had met.

By Mr. Tabb:

517 46. I want you to refer to this Exhibit, marked Exhibit No. 1, which has been filed with the deposition of Mr. Buechel, and ask you to state whether or not you made up that statement from the records here in your office?

A. Yes, I made the statement.

47. I will ask you to look at the top of this Exhibit, which says "Statement showing assessment of property listed in the name of The Ewald Iron Company as shown by the records of the City Assessor's Department, together with the amount of taxes and date of payment of same," I will ask you if this copy is made from the original records in your office, is this a copy of the original record?

A. It is.

48. With reference to the retrospective assessment and original assessment for the years 1904, 1905, 1906, 1907 and 1908, other than the assessment sued on herein?

A. Yes.

49. I now show you a statement which reads across the top "Statement showing assessment of property listed in the name of L. P. Ewald as shown by the records of the City Assessor's Department, together with amount of taxes and date of payment of same," I will ask you if you made up that statement?

A. Yes, I did.

50. State whether or not that is a correct copy of the original records in your office in reference to the matter shown therein?

518 A. It is.

51. Was that made by you?

A. Yes.

52. I will ask you to file it as part of your deposition and mark it Exhibit Murphy No. 1?

A. I do so.

53. In reference to the assessment of personal property mentioned herein for the years 1904, 1905, 1906, 1907 and 1908, I will ask you if those assessments were based on schedule filed by L. P. Ewald or whether they were arbitrary assessments?

A. I think these were arbitrary assessments covering the household goods, &c., on Third street.

54. I will ask you whether or not, aside from the assessment sued on herein, with that exception, were there any other assessments made against L. P. Ewald, other than those shown by the statement filed herewith?

A. I do not know of any.

55. Do your records show any?

A. No others.

56. If there had been any other assessments, would your record show?

A. Yes.

By Mr. Crawford:

57. Was the amount given you by Mr. Buechel, \$2,134,000.00?

A. \$2,150,000.00.

Reading and signature waived.

519 Also the deposition of Mr. JOHN BUECHEL, taken at the same time and place.

Mr. Buechel, being first duly sworn, was examined by Mr. Crawford, and testified as follows:—

1. When did you become the City Assessor of the City of Louisville?

A. In November, 1909.

2. You were City Assessor of Louisville, Kentucky, on November 22nd, 1910?

A. Yes, I had been elected a short time.

3. It is a fact that in making assessments, you are the assessing officer of the city of Louisville?

A. I am.

4. In making both original and retrospective assessments?

A. Yes.

5. On November 22nd, 1910, was Mr. C. C. Murphy your chief deputy?

A. Yes.

6. Mr. Murphy testified that on November 22nd, 1910, he got out notices of retrospective assessments which you directed him to make against the estate of L. P. Ewald, deceased?

A. Yes.

7. Is that correct?

A. Yes.

8. In making assessments and retrospective assessments, do you act upon knowledge or information?

A. Yes, the best we have at hand.

9. Do you ever make an assessment without knowledge or information that the person against whom the assessment is made has omitted some property?

A. We do whenever they refuse to appear and list their property.

10. I mean when they have made—when they have already listed on original assessment and you make a retrospective assessment.

A. It is not customary to make a retrospective assessment after making an original assessment.

11. Mr. L. P. Ewald had made an assessment of his property for the years 1906, 1907 and 1908?

A. I can't say without reference to the record.

12. Assuming that he had done so, would you have made a retrospective assessment against him without having information of the fact that he had omitted property from assessment?

A. There would have been no occasion to do so unless we had information.

13. On November 22nd, 1910, did you know of any property that Mr. Ewald had omitted from assessment for the years 1906, 1907, and 1908?

A. The only information that we had was the statements made before the Board of Equalization as to the amount of cash on hand owned by Mr. Ewald?

14. Where was that?

A. Before the Board of Equalization.

15. I mean, where was the cash on hand?

A. I don't know that they went into details—I think in St. Louis.

16. Isn't it a fact that the only retrospective assessment made by you was to cover cash on deposit in Missouri banks in the name of the Ewald Iron Company?

Objected to by Mr. Tabb.

A. I don't know that. I paid much attention to where this money was.

17. Did you know of any money in Louisville that was omitted from assessment belonging to Mr. Ewald?

522 A. Only from the statement of Mr. Botts of the Columbia Trust Company at the time.

18. That was when he appeared before the Board of Equalization in response to your notice?

A. Yes.

19. You made a retrospective assessment before that time, had you not?

A. No sir, after that.

20. It was made after that?

A. Yes, in 1910, he appeared before the Board of Equalization, in 1909.

21. On the day that he appeared before the Board of Equalization, didn't he come in answer only to the notice of a retrospective assessment for the years 1906, 1907, and 1908?

A. I think so, that was on advice of Mr. Blakey, who was then the City Attorney.

22. You had already made the assessment,—you made the assessment four days before the 22nd?

A. I think not.

23. You did not make the assessment except on information that you obtained from Mr. Botts, when he testified before the Board of Equalization in answer to a retrospective assessment for the years 1904 and 1905?

523 A. Yes, 1904 and 1905.

24. Is that right?

A. Yes, that is right.

25. You had then no other information as to omitted property than that?

A. That is all the information we had, that statement.

26. And that is what your retrospective assessment intended to cover, is it?

A. It was.

27. There was no other property known to you that L. P. Ewald had omitted to assess?

A. I am not just clear about that. There was a good deal of discussion about it at the time, and that was the amount that was stated, whether that was cash on hand, or what it was, I do not remember.

28. That was the amount that was discussed as being in bank in St. Louis?

A. I don't know whether it was in bank in St. Louis or not.

29. You don't know whose credit it was in bank?

524 A. From the statement that was made, it must have been to the credit of L. P. Ewald.

30. I will ask you to look over the proceedings of that Board and see if it was not to the credit of the Ewald Iron Company.

A. I suppose the record will show that.

31. After refreshing your recollection from the record, isn't it true that Mr. Botts at that time stated that the money was on deposit in the St. Louis banks to the credit of the Ewald Iron Company?

Objected to by Mr. Tabb on the ground that the record speaks for itself.

A. The only information that we would have would be your record.

32. And that was the sole source of your information as to omitted property?

A. Yes.

33. Did you intend to include in the retrospective assessment any other property owned by L. P. Ewald, which you claimed had been omitted for the years 1906, 1907 and 1908?

Objected to by Mr. Tabb, who instructs the witness not to answer.

The witness being directed to answer Mr. Tabb, asks to
525 have the question certified to the Court for a ruling.

By the Witness: I refuse to answer on the advice of counsel.

34. Did you at that time know or have any information that any stock or bonds or any other personal property, other than the money referred to by you, was omitted from assessment by L. P. Ewald for the years 1906, 1907, and 1908?

Objected to by Mr. Tabb, who instructs the witness not to answer.

The witness being directed to answer, Mr. Tabb asks to have the question certified to the Court for a ruling.

Met on June 5th, 1913, by agreement and proceeded with the deposition of Mr. JOHN BUECHEL.

Examined by Mr. Crawford:

35. Mr. Buchel, the Court has ruled that certain questions must be answered. On your former examination you were asked this question:—

#33. Did you intend to include in that retrospective assessment any other property owned by L. P. Ewald which you claimed had been omitted for the years 1906, 1907 and 1908?"

A. That retrospective assessment intended to include everything in the way of personal property owned by Mr. Ewald.

36. Did you know of any personal property or have you any information that L. P. Ewald had omitted any personal property other than the money on deposit in St. Louis?

526 A. All the information I had about that is that he had omitted personal property, I would judge that would include stock, bonds, mortgages and notes.

37. Where did you get that information?

A. Mr. Botts made the statement without specifying the items.

38. Your sole information was the statement that you heard, of which I have a transcript, the testimony that was heard before the Board of Equalization on November 26th, 1909?

A. I never saw that transcript.

39. You heard the testimony given on that day?

A. I don't remember that, that was two years ago, a long time to remember.

40. Did you ever talk to Mr. Botts on any other occasion?

A. No sir.

41. Were you present at the meeting of the Board of Equalization on that day?

A. I was.

42. Wasn't the only question that was raised at that time, or argued at that time as to why a retrospective assessment should be made against L. P. Ewald, wasn't that argued by Mr. Blake, the representative of the City of Louisville?

A. I can't remember the details of that conversation.

43. Do you know now of any property that L. P. Ewald
527 had omitted for the years 1903, 1904, 1905, 1906 and 1907?

A. Of my own knowledge?

44. Yes.

A. I couldn't say as to that.

45. Did you ever learn of any personal property that he had omitted from assessment?

A. As I say, the only information I had about that was the statement that so much property was turned over to the executor, under the will of L. P. Ewald, and that it amounted in a lump sum to so much, what the items were, what the property was, I do not know, I do not know what the particular property was.

46. You have charge of the records of the City of Louisville—the assessment records—for the years 1903, 1904, 1905, 1906 and 1907, have you not?

A. I am in charge of the records.

47. Isn't it a fact that the Ewald Iron Company paid taxes on all of its property located in Jefferson County for those years?

A. I have never looked at the records to find out, I don't know what they paid on.

48. Do you know of any property located in Jefferson County belonging to the Ewald Iron Company which was omitted from assessment?

A. Of my actual knowledge?

49. Yes.

528 A. I have no actual knowledge.

50. I will ask you to examine the records and see if they have not paid the taxes of the Ewald Iron Company upon all tangible property located in Jefferson County for the years 1904, 1905, 1906, 1907 and 1908?

A. I file herewith a statement showing what they have paid.

51. Do you now claim that the Ewald Iron Company omitted any property from assessment which it had in Jefferson County, not covered by the statement which you have filed?

(Statement filed as Exhibit No. 1 Buechel.)

A. I do not know where this property is located.

52. Well I say anywhere?

A. My recollection is that the statement which was made was that there was so much property turned over to the executor.

53. I am speaking of the property of the Ewald Iron Company, not L. P. Ewald?

A. All that I know belonging to the Ewald Iron Company is its plant located on Clay Street near the river.

54. They have paid the taxes on that plant for the years 1904, 1905, 1906, 1907 and 1908, have they not?

A. Whatever that statement shows will be true.

55. In the statement that you have filed here are two retrospective assessments against the Ewald Iron Company for the years 1904, and 1905, the records of your office show that these were
529 made in 1906 against the Ewald Iron Company for these two years, do they not?

A. Yes.

56. Those tax bill- have all been paid?

A. They are marked paid, yes.

57. Both the original and the retrospective assessment?

A. The retrospective assessment on \$6,000 amounted to \$111.60 for the year 1904 and on \$6,000 for the year 1905 amounted to \$111.60.

58. They have both been paid?

A. Yes.

59. The retrospective assessment- for those two years were made by the City Assessor—

A. At that time, yes.

60. They did not specify, the retrospective assessments did not specify.

61. Blanket assessments were made without describing what particular property they were to cover?

A. I can't answer that question, I did not make the assessment.

62. Your records show that they were made that way?

A. The records do not show any specific property—it is not mentioned in the retrospective assessment.

By Mr. Tabb:

63. I will ask you — state your full name and your
530 occupation?

A. John Buechel, City Assessor.

64. How long have you been City Assessor of Louisville?

A. About three and one half years.

65. When did your term of office commence?

A. I think November 9th, 1909.

66. I will ask you to examine the tax bills in this suit, being tax bill No. 30,277 for 1904, 17,137 for 1905, 18,029 for 1906, 26,508 for 1907, and 26,621 for the year 1908, and state whether they are and each of them is an original tax bill?

A. They are.

67. When and by whom were they made out?

A. They were made out by Mr. Murphy under my direction.

68. I will get you to state the date?

A. For 1906, 1907, 1908 and 1909 they were issued on January 4th, 1911.

69. What about the years 1904-1905?

A. I don't believe this statement shows the date of those, I will have to get that date.

70. Will you get the date and furnish it to the stenographer?

A. Tax bill No. 30,277 for 1904 and No. 17,137 for 1905 were issued and file- with the Tax Receiver on March 1st, 1910.

71. After they were made out, what was done with them, to whom were they delivered?

A. To the Tax Receiver of the City of Louisville.

531 72. State what the words are that are stamped across the face of the bills and by whom the words were stamped?

A. Original tax bill for fiscal year ending August 31st, 1904. John Buechel, Assessor.

Original tax bill for fiscal year ending August 31st, 1905, John Buechel, Assessor.

Original tax bill for fiscal year ending August 31st, 1906. John Buechel, Assessor.

Original tax bill for fiscal year ending August 31st, 1907. John Buechel, Assessor.

Original tax bill for fiscal year ending August 31st, 1908. John Buechel, Assessor.

73. Is that signature on those bills written by you?

A. It is a facsimile.

74. Of whose signature is it a facsimile?

A. My own.

75. By whom and under what circumstances was that stamped on there?

A. I authorized it.

76. Is it true that in each case in reference to each of the tax bills mentioned, that that is a facsimile of your signature?

A. Yes.

77. And that you authorized it to be so stamped?

A. Yes.

532 By Mr. Crawford:

78. Mr. Murphy has testified, that in making the retrospective assessments for 1906, 1907 and 1908, you gave him the amount \$2,150,000, and told him to scale it down from the year 1905 to 1909 inclusive, I will ask you now, having refreshed your recollection, is it not true that that was the amount which was deposited in bank in St. Louis to the credit of the Ewald Iron Company, and that was the basis upon which you made the assessment?

A. I think I have answered that question before. I didn't know just what it was, what items, but that it was personal property.

79. I will ask you to read this, I will ask you if this is not what occurred at that meeting?

By Mr. Tabb: What are you referring to now?

By Mr. Crawford: To this stenographic transcript of the proceedings.

By Mr. Tabb: Will you file that?

By Mr. Crawford: I will not.

80. I will ask you to read that?

A. I have never seen it.

81. Doesn't it read "Was the entire dividend declared by the Ewald Iron Company paid over to the Columbia Trust Company as executor of the Ewald estate?"

By Mr. Blakey: "How much did that actual balance in St. Louis banks amount to. You say something over \$2,000,000."

533 By Mr. Gibson: "\$2,134,000."

I will ask you if that does not refresh your recollection?

A. I can't remember, I have never looked over that deposition, I don't know anything about it.

82. Isn't that where you got your figures \$2,150,000?

A. I can't remember that.

By Mr. Tabb:

83. I will ask you whether in making the retrospective assessment sued on herein for the years 1906, 1907 and 1908, the assessments were made against any specific or particular property belonging to L. P. Ewald or whether it was intended to cover all of his personal property subject to taxation by the City of Louisville, which had been omitted from taxation for the years mentioned, including stocks, bonds cash or other personal property?

Objected to by Mr. Crawford.

A. It was.

84. The question is in the alternative, does your answer "It was," refer to the first part or the last part?

A. It was intended to cover all of these different items.

85. You mean the items in the latter part of the question?

A. Yes, the latter part of your question.

Reading and signature waived.

534 Met by agreement at the office of Gibson & Crawford, in the Realty Building in Louisville, Kentucky, and proceeded to take the deposition of Mr. L. W. Botts.

Mr. Botts, being first duly sworn, was examined by Mr. Crawford and testified as follows:

1. You are Vice President of the Fidelity-Columbia Trust Company?

A. I am.

2. In November, 1909, you were President of the Columbia Trust Company?

A. I was.

3. That company was at that time acting as executor and trustee under the will of L. P. Ewald, deceased?

A. It was.

4. Did you receive a notice from the City of Louisville of a retrospective assessment against the estate of L. P. Ewald prior to November 26th, 1909?

A. I did.

5. Did you lodge a protest against that assessment?

A. I did.

6. On November 26th, 1909, did you appear before the Board of Equalization of the City of Louisville, representing the estate of L. P. Ewald, deceased, as executor and trustee under the will of L. P. Ewald, protesting against the assessment?

535 A. I did.

7. At that time please state whether or not there was any controversy of fact presented to the Board?

A. None.

8. This assessment covers the years 1904, 1905, 1906, 1907, 1908 as finally made on November 28th, 1909, at that time was your company familiar with what estate L. P. Ewald had on September 1st, 1903, 1904, 1905, 1906 and 1907?

A. No.

9. What effort did you make on that day when you appeared before the Board of Equalization, to ascertain what property of L. P. Ewald had been retrospectively assessed?

A. None.

10. Did you endeavor to find out from the City Assessor what was retrospectively assessed?

A. I did.

11. What did the city Assessor claim was retrospectively assessed?

A. He did not state specifically at all. We endeavored to get him to go on the stand and make a statement of what property was assessed but that was objected to by the City Attorney and he was not permitted to go on the stand, there was nothing but an arbitrary statement as I now recall before the board.

536 12. At that time did you know what had been retrospectively assessed?

A. I did not.

13. Did you know what property it was claimed Mr. L. P. Ewald had omitted from assessment?

A. No.

14. Was any argument made before the Board of Equalization by the City Attorney as to the liability of the L. P. Ewald estate for any property?

A. It was not.

15. What was the claim that was made?

A. Mr. Blakey, the then City Attorney, took the position that the stock of the Ewald Iron Company, a corporation, was substantially owned by L. P. Ewald individually and therefore it was liable to taxes, as against the estate of L. P. Ewald, deceased.

16. On account of what money?

A. On account of the money that was in the name of and belonged to the corporation, the Ewald Iron Company.

17. Where was that money that you refer to?

A. In St. Louis, Missouri.

18. Was it on deposit there?

A. It was.

19. Did it consist of certificates of deposit or open accounts?

537 A. Largely certificates of deposit.

20. Do you know how long they have been on deposit there?

A. No I do not.

21. Has any property come to your hands, or any records come into your hands, as executor of the estate of L. P. Ewald, deceased, showing that any other property than the stock of the Ewald Iron Company, was owned by Mr. L. P. Ewald and not listed for taxation on September 1st, 1903, 1904, 1905, 1906 and 1907?

A. No.

22. I believe you found some personal property belonging to Mr. L. P. Ewald in St. Louis?

A. We did.

23. Where was that?

A. In the safe in the office of the Ewald Iron Company.

24. Was it in the general safe of the Ewald Iron Company or was it in a specific compartment, where did you find it?

A. It was—I do not recollect the exact compartment it was in, but it was in the safe in the office of the Ewald Iron Company at its place of business in St. Louis.

25. Did the Ewald Iron Company—did any officer of the Ewald Iron Company have a key to that place?

A. I do not think so.

26. How did you get in?

538 A. Mr. Gibson and I were together and we caused it to be opened by a locksmith.

27. He had to bore it to get in?

A. Yes.

28. In that safe, I believe, you found some stock of the Helmbacher Forge & Rolling Mill Company?

A. We did.

29. You also found some stock of the Granby Mining & Smelting Company?

A. Yes sir.

30. Do you know whether or not that stock had ever been in Kentucky?

A. I do not know but I assume it had not.

31. What became of the stock of the Helmbacher Forge & Rolling Mill Company, who took charge of that, and the Granby Mining & Smelting Company stock?

A. It was turned over to the St. Louis Union Trust Company, which company was appointed administrator with the will annexed.

32. Did that company claim control over this stock as Missouri assets?

A. Yes.

33. After investigation state whether or not you recognized theirs as being a correct claim?

539 A. Under the advise of counsel we recognized it and left the stock there with them, in their possession.

34. Is that property still in the hands of the St. Louis Union Trust Company?

A. Yes.

35. Do you know whether any of the property that you found in St. Louis was owned by Mr. Ewald on September 1st, 1903, 1904, 1905, 1906 and 1907?

A. I do not.

36. Have you any way of ascertaining that fact?

A. No.

37. Did Mr. Ewald keep any private book which came to your possession, or which you found, which would indicate what property he had on September 1st, 1903, 1904, 1905, 1906 and 1907?

A. No.

38. Did he keep any private books of any kind that you know of, any private account book?

A. I have an impression that there was a personal account book in regard—no, that was a corporation book in regard to the money on deposit there.

39. The Ewald Iron Company was a Kentucky corporation I believe?

A. It was.

540 40. Did you after Mr. Ewald's death go to St. Louis in regard to his estate?

A. I did.

41. What did you find relative to the office of the Ewald Iron Company?

A. I found that they had an office and plant where a good deal of the iron was stored, that was their main shipping point for the west.

42. Was or not that the general office of the Ewald Iron Company?

A. It was.

43. I have a certified copy of the Articles of Incorporation of the Ewald Iron Company here, I will ask you to file those?

A. I do.

"Filed as Exhibit No. 1, Botts."

44. Was any claim made before the Board of Equalization at the meeting of November 26th, 1909, that the estate of L. P. Ewald was liable for retrospective assessment on account of either the Helmbacher Forge & Rolling Mill stock or the Granby Mining & Smelting Company stock?

A. They were not referred to specifically.

45. Mr. Botts, you testified at that hearing as representing the estate of L. P. Ewald, I believe?

A. I did.

541 46. The notice on which you attended that meeting was for the years of 1904, 1905, and 1909, at the conclusion of that meeting were you served with any additional notice of retrospective assessments?

A. I was.

47. What was done in response to that?

A. I turned it over to our counsel, Mr. Gibson.

48. What did he do at that meeting respecting this retrospective assessment?

A. He made, as I recollect it, the same protest against that assessment as he did against the one for which we were having that hearing.

Cross-examination by Mr. Tabb:

49. Were you familiar with the affairs of the Ewald Iron Company before Mr. Ewald's death?

A. No.

50. Did you know anything about the Ewald Iron Company before that time?

A. No.

51. Had you been in their office in St. Louis at all until after his death?

A. No.

52. Do you recollect just when it was when you found this stock of Helmbacher Forge & Rolling Mill Company and Granby Mining & Smelting Company—do you remember just when it was you found that stock?

542 A. Let me see, Mr. Ewald died on the 31st day of July, 1909, and it was within 30 days after that, that we were in St. Louis.

53. How many shares of the Helmbacher Forge & Rolling Company stock did you find?

A. Eight hundred and fifty.

54. Eight hundred and fifty?

A. Yes.

55. And how many of the Granby Mining & Smelting Company?

A. Five hundred.

56. Did you examine these certificates—or was this Helmbacher Forge & Rolling Mill stock in one certificate, do you remember?

A. I do not remember.

57. Can you give me the dates of the certificates?

A. No, I cannot.

58. Do you know when this stock was issued?

A. No.

60. Do you know whether either of this stock has been sold?

A. The Helmbacher Forge & Rolling Mill stock has been sold.

543 61. That is the 850 shares?

A. Yes.

62. When was that sold, Mr. Botts?

A. I do not think that I could give you the exact date of the sale.

63. Did you make an investigation to find out the value of the Helmbacher Forge & Rolling Mill stock or the Granby Mining & Smelting Company stock?

A. Both of those stocks were known in St. Louis and we were not at all familiar with them here and we instructed the St. Louis Union Trust Company, administrator in St. Louis, to attend to that?

64. You did not make an investigation as to the value?

A. I do not think so—I made no personal investigation.

65. What other stock did you find in the vault besides the Granby Mining & Smelting Company and the Helmbacher Forge & Rolling Mill Company stock?

A. None.

66. In your testimony before the Board of Equalization, Mr. Botts, you referred to some Galt House stock, which belonged to the estate of L. P. Ewald?

A. Yes.

67. How many shares of stock did he own in the Galt House Company?

544 A. I think it was 500 shares, but it had proved to be worthless, 500 shares of common stock as I recollect it, which has since proved worthless.

68. How long have you been connected with the Columbia Trust Company in the capacity of—I believe you were President for a while?

A. I was, I have been connected with the Columbia Trust Company in various capacities for the past twenty four years.

69. How long were you President?

A. Since 1907.

70. Do you know when Mr. L. P. Ewald acquired the Galt House stock?

A. I do not.

71. Have you the certificate for that stock in your possession, that is your company?

A. It is still in the possession of our Company.

72. Will you examine that certificate or those certificates of stock in the Galt House Company and see if they show when they were issued and give the date to the stenographer?

A. I will.

73. Mr. Botts, on your direct examination, you stated in effect that after you had appeared before the Board of Equalization and made a complaint against the assessment for the years 1904,
545 1905, and 1909 that a notice was handed you of a retrospective assessment—a notice for another retrospective assessment?

A. Yes.

74. Do you know for what year that was?

A. No, I do not.

75. Is your recollection entirely clear just as to what was done with that notice?

A. Our counsel, Mr. Gibson, was present at the time and when the notice was served upon me I turned it over to him and *the* he

made a statement—he made a protest against that as he had made to the assessment upon which we were then having a hearing.

76. There was only one meeting, I believe, before the Board of Equalization as to the retrospective assessment?

A. Only one so far as I know.

77. And that was the meeting of November 26th, 1909?

A. Yes.

78. Mr. Botts, did your company or you or any one for your company ever learn when that Helmbacher Forge & Smelting Company was acquired?

A. No.

79. That information could be gotten, I suppose, from the St. Louis Union Trust Company?

546 A. I very much doubt it, they know about as little of his affairs as we do.

80. Do you know whether those certificates would show when they were issued?

A. I think the certificates would show when they were issued.

81. I will ask you if you will try to secure from the St. Louis Union Trust Company a statement as to when the certificates of stock held by L. P. Ewald, in the Helmbacher Forge & Rolling Mill Company and the Granby Mining & Smelting Company were issued to him, and whether they were original certificates or whether they were issued to take the place of other stock which he had previously had, in other words, learn, from them the best you can when he acquired any of the shares of stock in either of these companies and what was the market values of these respective shares on September 1st, 1903, 1904, 1905, 1906 and 1907?

A. I will.

By Mr. Crawford:

82. You have been asked about the Helmbacher Forge & Rolling Mill stock and you stated that it was sold—did you sell it?

A. No.

83. Did you receive any of the money that it brought?

A. No.

547 84. Who sold it?

A. The St. Louis Union Trust Company.

85. Where is that money that was received from that stock?

A. With the St. Louis Union Trust Company.

86. Has it ever been in Louisville?

A. No.

87. Has that company ever accounted to you for it?

A. No.

88. You spoke of the Galt House stock, what Galt House is that?

A. Louisville, Kentucky.

89. The hotel here in Louisville?

A. Yes, up here at First and Main.

90. That was a Kentucky corporation?

A. Yes, I think so.

91. The certificate of stock will show that?

A. Yes.

92. Will you furnish that information to the stenographer?

A. I will.

93. That property was located in Jefferson County?

A. Yes.

548 94. You say the stock is worthless?

A. Yes.

95. The concern has since gone into bankruptcy?

A. Yes.

96. Do you remember when that was?

A. No, I do not know.

By Mr. Tabb:

97. Do you know what that stock was worth on September 1st, 1903, 1904, 1905, 1906 and 1907, this Galt House stock?

A. I do not.

98. You will not say that it was worthless on those dates, will you?

A. I could not make a statement about it, as to those dates.

By Mr. Crawford:

99. It was nontaxable, a Kentucky corporation?

A. If it was a Kentucky corporation it was non-taxable.

By Mr. Tabb:

100. You say that the St. Louis Union Trust Company has never accounted to your company for the money received from the sale of the Helmbacher Forge & Rolling Mill Company stock?

A. Yes.

549 101. Why, Mr. Botts, should it not account to you?

A. It was appointed administrator with the will annexed and it has not finally settled its accounts.

102. When it finally settled its accounts—that money will be turned over to you, will it not?

A. That is a question.

103. You will claim that it should be turned over to your company, will you not?

By Mr. Gibson: Under the advise of counsel he can answer that he will.

Reading and signature waived.

550 STATE OF KENTUCKY,
County of Jefferson:

I, Pauline Eckenroth, Official Stenographer, Jefferson Circuit Court, Chancery Branch, Second Division, certify that the foregoing depositions of Louis Summers, Cornelious Murphy, John Buechel and L. W. Botts, were taken before me at the time and place and for the purpose in the caption stated; that the witnesses were first duly sworn to tell the truth, the whole truth and nothing but the truth,

that the depositions were taken by me in shorthand and the foregoing is a true and correct transcript of my notes. Plaintiff was represented at the time by Mr. Cary Tabb and Mr. Stuart Chevalier, and the defendant by Mr. William Crawford and Mr. Charles H. Gibson. Reading of the depositions and signatures of the witnesses were waived by counsel. The said depositions were taken pursuant to order of reference entered in this action on the day of —, 1913.

Witness my hand this 23rd day of June, 1913.

PAULINE ECHENROTH,
*Official Stenographer, Jefferson Circuit Court,
Chancery Branch, Second Division.*

Fee \$23.60.

Examined and approved and made a part of the record.

SAMUEL B. KIRBY, *Judge.*

551 *Statement showing assessment of property listed in the name of "L. P. Ewald," as shown by the records of the City Assessor's Department, together with amount of taxes and date of payment of same.*

| Assessment, &c., for Fiscal Year 1904. | | | | | |
|--|---|-------|--------------|-------------------|-----------------------|
| No. of bill. | Description of property. | Land. | Improvement. | Total assessment. | Amount of tax. |
| 17985. | 40 x 200 E. 3d York & Breckenridge @ \$70.... | 28.00 | 60.00 | 88.00 | 163.68 Pd. 1-21-1904. |
| 17986. | Personal property ..... | ..... | 6.00 | 6.00 | 11.16 Do. |
| | Total | 28.00 | 66.00 | 94.00 | 174.84 |
| Assessment, &c., for Fiscal Year 1905. | | | | | |
| 20041. | 40 x 200 E. 3 York & Breckenridge @ \$65..... | 26.00 | 60.00 | 86.00 | 159.96 Pd. 1-23-1905. |
| 20042. | Personal Property ..... | ..... | 6.00 | 6.00 | 11.16 Do. |
| | Total | 26.00 | 66.00 | 92.00 | 171.12 |
| Assessment, &c., for Fiscal Year 1906. | | | | | |
| 19889. | 40 x 200 E. 3d York & Breckenridge @ \$65.... | 26.00 | 60.00 | 86.00 | 154.80 Pd. 1-25-1906. |
| 19890. | Personal Property ..... | ..... | 6.00 | 6.00 | 10.80 Do. |
| | Total | 26.00 | 66.00 | 92.00 | 165.60 |

552

Assessment, &c., for Fiscal Year 1907.

| No. of bill. | Description of property. | Land. | Improve- ment. | Total assess- ment. | Amount of tax. |
|--------------------|--|-------|-------------------|---------------------------|----------------------|
| 20132. | { 40 x 200 E. 3d York & Breckenridge @ \$65. . . | 26.00 | 60.00 | 86.00 | 176.40 |
| | { Personal Property . . . . . | ..... | 12.00 | 98.00 | ..... |
| | Total | 26.00 | 72.00 | 98.00 | 176.40 |

Pd. 1-31-1907.

Assessment, &c., for Fiscal Year 1908.

| | | | | | |
|--------|--|-------|--------|--------|--------|
| 20700. | { 40 x 200 E. 3d York & Breckenridge @ \$65. . . | 26.00 | 60.00 | 86.00 | 171.50 |
| 20701. | { Personal Property . . . . . | ..... | 12.00 | 98.00 | ..... |
| | { 40 x 200 E. 3d York & Breckenridge @ \$65. . . | 26.00 | 28.00 | 54.00 | 94.50 |
| | Total | 52.00 | 100.00 | 152.00 | 266.00 |

Pd. 1-29-1908.

Do.

NOTE.—In the above statement the assessment figures show dollars only, as assessment valuations do not include cents.
Exhibit "F."

553

Assessment, &c., for Fiscal Year 1904.

| No. of bill. | Description of property. | Land. | Improvement. | Total assessment. | Amount of tax. | |
|--------------------|---|-------|--------------|----------------------|----------------------|----------------|
| 1952. | 50 x 106 1/4 N. E. Cor. Hancock & Spurrier @ \$3. | 1.50 | ..... | 1.50 | 2.79 | Pd. 1-21-1904. |
| 1953. | 153 3/5 Creek S. Sparrow-Hancock & Gray @ \$4. | 6.14 | ..... | 6.14 | 11.42 | Do. |
| 1954. | 360 x 206 3/4 W. Clay Fulton & Creek @ \$6..... | 21.60 | 80.00 | 101.60 | 188.98 | Do. |
| 1955. | 57 1/2 x Creek, S. Spurrier, Hancock & Gray, @ Val. | 1.50 | ..... | 1.50 | 2.79 | Do. |
| 1956. | 369 x 201 E. Clay, Fulton & Creek @ \$5..... | 18.45 | 5.00 | 23.45 | 43.62 | Do. |
| 1957. | 50 x 105 E. Hancock, Fulton & Spurrier @ 3..... | 1.50 | ..... | 1.50 | 2.79 | Do. |
| 1958. | 50 x 107 N. W. Cor. Hancock & Spurer @ 3..... | 1.50 | ..... | 1.50 | 2.79 | Do. |
| 1959. | Personal property ..... | ..... | 234.00 | 234.00 | 435.24 | Do. |
| 30171. | { Do " Retrospective assessment based on judgment of Court March 14th, 1906,.... | ..... | 60.00 | 60.00 | 111.60 | Pd. 4-20-1907. |
| | Total | 52.19 | 379.00 | 431.19 | 802.02 | |

554

Assessment, &c., for Fiscal Year 1905.

| No. of bill. | Description of property. | Land. | Improvement. | Total assessment. | Amount of tax. | |
|--------------------|--|-------|--------------|----------------------|----------------------|----------------|
| 1724. | 50 x 106 1/4 N. E. Cor. Hancock & Spurer @ \$3., | 1.50 | | 1.50 | 2.79 | Pd. 1-23-1905. |
| 1725. | 153 3/5 Creek, S. Spurreer, Hancock & Clay, @ \$4 | 6.15 | | 6.15 | 11.44 | Do. |
| 1726. | 360 x 206 3/4 W. Clay, Fulton & Creek @ \$6. | 21.60 | 80.00 | 101.60 | 188.98 | Do. |
| 1727. | 57 1/2 x Creek S. Spurrer, Hancock & Clay @ Val. | 1.50 | | 1.50 | 2.79 | Do. |
| 1728. | 369 x 201 E. Clay, Fulton & Creek @ 5. | 18.45 | | 18.45 | 34.82 | Do. |
| 1729. | 50 x 105 E. Hancock, Fulton & Spurer @ 3. | 1.50 | 5.00 | 6.50 | 12.09 | Do. |
| 1730. | 50 x 107 N. W. Cor. Hancock & Spurer @ 3. | 1.50 | | 1.50 | 2.79 | Do. |
| 1731. | Personal Property | | 236.40 | 236.40 | 439.70 | Do. |
| 16976. | { Retrospective assessment based " on judgment of Court, Nov. 14, 1906. | | 60.00 | 60.00 | 111.60 | Pd. 4-20-1907. |
| | Totals | 52.50 | 381.40 | 433.60 | 806.50 | |

Assessment, &c., for Fiscal Year 1906.

555

| No. of bill. | Description of property. | Land. | Improvement. | Total assessment. | Amount of tax. | |
|--------------|--|-------|--------------|-------------------|----------------|----------------|
| 1675. | 50 x 106 1/4 N. E., Hancock & Spurrer @ 3..... | 1.50 | ..... | 1.50 | 2.70 | Pd. 1-25-1906. |
| 1676. | 153 3/5 x Creek S., Spurrer, Hancock & Clay @ 4..... | 6.15 | ..... | 6.15 | 11.07 | Do. |
| 1677. | 360 x 206 3/4 W., Clay, Fulton & Creek @ 6..... | 21.60 | 80.00 | 101.60 | 182.88 | Do. |
| 1678. | 57 1/2 x Creek S., Spurrer, Hancock & Clay @ Val. | 1.50 | ..... | 1.50 | 2.70 | Do. |
| 1679. | 369 x 201 E., Clay, Fulton & Creek @ 5..... | 18.45 | ..... | 18.45 | 33.21 | Do. |
| 1680. | 50 x 105 E., Hancock, Fulton & Spurrer @ 3... | 1.50 | 5.00 | 6.50 | 11.70 | Do. |
| 1681. | 50 x 107 N. W. Cor. Hancock & Spurrer @ 3... | 1.50 | ..... | 1.50 | 2.70 | Do. |
| 7297. | Personal Property ..... | ..... | 350.35 | 350.35 | 630.63 | Do. |
| | Total | 52.20 | 435.35 | 487.55 | 877.59 | |

Filed in Court, 1913, March 19. Attest: Louis Somers, Clerk, by J. W. Harrison, Deputy Clerk.
Exhibit "E."

Assessment, &c., for Fiscal Year 1907.

556

| No. of bbl. | Description of property. | Land. | Improve- ment. | Total assess- ment. | Amount of tax. | |
|-------------------|--|-------|-------------------|---------------------------|----------------------|----------------|
| 1777. | 100 x 206 W., Clay River & Fulton @ \$6..... | 6.00 | 4.00 | ..... | ..... | Pd. 1-31-1907. |
| 1778. | Personal Property ..... | ..... | 352.10 | 362.00 | 651.78 | Do. |
| 1779. | 34 x 206 W., Clay River & Fulton @ 6..... | 2.04 | ..... | 2.04 | 3.67 | Do. |
| 1780. | 29 x 103 W., Hancock, Fulton & Spurrer @ 5... | 1.45 | ..... | 1.45 | 2.61 | Do. |
| 1781. | 84 x 103 E., Hancock, Fulton & Spurrer @ 3... | 2.52 | ..... | 2.52 | 4.53 | Do. |
| 1782. | 51 1/5 x 178 S. E., Cor. Hancock & Spurrer @ 2. | 1.02 | ..... | 1.02 | 1.84 | Do. |
| 1783. | 50 x 106 1/4 N. E., Cor. Hancock & Spurrer @ 3... | 1.50 | ..... | 1.50 | 2.70 | Do. |
| | 153 3/5 x Creek S., Spurrer, Hancock & Clay @ 4 | 6.14 | ..... | 6.14 | 11.05 | Do. |
| 1784. | 360 x 206 1/2 W., Clay, Fulton & Creek @ 6..... | 21.60 | 80.00 | 101.60 | 182.88 | Do. |
| 1785. | 57 1/2 x Creek, Spurrer, Hancock & Clay @ Val.. | 1.50 | ..... | 1.50 | 2.70 | Do. |
| 1786. | 369 x 201 E., Clay, Fulton & Creek @ 5..... | 18.45 | ..... | 18.45 | 33.21 | Do. |
| 1787. | 50 x 105 E., Hancock, Fulton & Spurrer @ 3... | 1.50 | 5.00 | 6.50 | 11.70 | Do. |
| 1788. | 50 x 107 N. W., Cor. Hancock & Spurrer @ 3... | 1.50 | | 1.50 | 2.70 | Do. |
| | Totals..... | 65.22 | 441.10 | 506.32 | 911.37 | |

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Assessment, &c., for Fiscal Year 1908.

| No. of bill. | Description of property. | Land. | Improvement. | Total assessment. | Amount of tax. | |
|--------------------|--|-------|--------------|----------------------|----------------------|----------------|
| 1811. | { 100 x 206 W., Clay, Water & Fulton @ \$6. | 6.00 | 4.00 | ..... | ..... | Pd. 1-21-1908. |
| 1812. | { Personal Property ..... | ..... | 500.00 | 501.00 | 892.50 | |
| 1813. | 34 x 206 1/2 W., Clay, Water & Fulton @ \$6. | 2.04 | ..... | 2.04 | 3.57 | |
| 1814. | 29 x 103 1/2 W., Hancock, Fulton & Spurrier @ \$5. | 1.45 | ..... | 1.45 | 2.53 | |
| 1814. | 84 x 103 1/2 E., Hancock, Fulton & Spurrier @ \$3. | 2.52 | ..... | 2.52 | 4.42 | |
| 1815. | 57 1/2 x 178 S. E., Cor. Hancock & Spurrier @ 2. | 1.15 | ..... | 1.15 | 2.06 | Do. |
| 1816. | 50 x 106 1/4 N. E., Cor. " " @ 3. | 1.50 | ..... | 1.50 | 2.63 | Do. |
| 1817. | 153 3/5 x Creek S., Spurrier, Hancock & Clay @ 4. | 6.14 | ..... | 6.14 | 10.74 | Do. |
| 1818. | 360 1/2 x 206 3/4 W., Clay, Fulton & Creek @ 6. | 21.60 | 83.00 | 104.60 | 183.05 | Do. |
| 1819. | 57 1/2 Creek S., Spurrier, Hancock & Clay @ Val. | 1.50 | ..... | 1.50 | 2.63 | Do. |
| 1820. | 369 x 201 E., Clay, Fulton & Creek @ 5. | 18.45 | ..... | 18.45 | 32.29 | Do. |
| 1821. | 50 x 105 E., Hancock, Fulton & Spurrier @ 3. | 1.50 | 5.00 | 6.50 | 11.37 | Do. |
| 1822. | 50 x 107 N. W., Cor. Hancock & Spurrier @ 3. | 1.50 | ..... | 1.50 | 2.63 | Do. |
| Total | | 65.35 | 592.00 | 657.35 | 1150.36 | |

558 We the undersigned Louis P. Ewald and Charles P. Ram-
ron, both of the city of St. Louis, and state of Missouri, do
hereby associate ourselves together to form a corporation under the
laws of the State of Kentucky in accordance with the provisions of
Chapter 56 of the revised Statutes of the State of Kentucky in rela-
tion to incorporated companies and acts amandatory thereof, for the
purpose following, namely:

First. Said corporation shall have all the powers and privileges
enumerated and conferred by said act.

Second. The private property of the members of said corporation
shall be exempt from any liability fro- corporate debts.

Third. The name of said corporation shall be the "Ewald Iron
Company" and the principal place of transacting its business in the
"Tennessee Rolling Works in Lyon County Kentucky.

Fourth. The business of said corporation shall be the manufacture
of iron at the said Tennessee Rolling works in the County of Lyon
and State of Kentucky and the selling of the product of its manu-
facture and such other articles as are connected therewith.

559 Fifth. The capital stock of said corporation shall be Two
hundred thousand dollars, to be divided into two hundred
shares of the par value of One hundred Dollars each, but said cor-
poration shall not commence business until stock to the amount of
One hundred and Twenty-five Thousand Dollars shall have been sub-
scribed thereto; Said stock subscribed shall be fully paid up within
three months from the date hereof in cash and any future subscrip-
tion shall be paid upon as subscribed.

Sixth. Said corporation shall continue for Twenty nine years com-
mencing from the date thereof.

Seventh. The business shall be conducted by a board of Two Di-
rectors who shall be elected annually on the First Tuesday of No-
vember at such place, as the bye laws shall provide, and the Board of
Directors for the first year, shall be L. P. Ewald and Charles P. Dam-
ron and the board of Directors shall elect a President and Secretary
and appoint such other officers and agents as the Bye laws may au-
thorize.

560 Eighth. The highest amounts of indebtedness or liability
direct or indirect or contingent to which said corporation is at
any time to be subject shall never exceed the sum of One Hundred
and Thirty Thousand Dollars.

In testimony Whereof we have hereunto set our hands and seals
this fifth day of November Eighteen Hundred and Eighty.

LOUIS P. EWALD. [SEAL.]
CHARLES P. DAMRON. [SEAL.]

STATE OF MISSOURI,
City of St. Louis, ss:

I, Charles D. Greene, Jr. a commissioner for Kentucky at St. Louis
Missouri, certify that this instrument of writing was this day pro-
duced to me by Charles P. Damron, One of the parties thereto, and by

him acknowledged to be his act and deed. In witness whereof, I have hereunto set my hand and official seal.

This fifth day of November, A. D. 1880.

[SEAL.]

C. D. GREENE, JR.,
Commissioner for Kentucky, at St. Louis, Missouri.

560½ STATE OF KENTUCKY,
Lyon County, set:

I, M. P. Molloy, clerk of the Lyon County Court, do certify that the foregoing instrument of writing was this day produced to me in my office and acknowledged by Louis P. Ewald a party thereto to be his act and deed for the uses and purposes therein set forth and lodged for record certified as above.

Whereupon I have truly recorded the same and the foregoing and this my own certificate in my said office.

Given under my hand this 12th day of November 1880.

M. P. MOLLOY,
Clerk Lyon County Court, Ky.

A copy, April 5th, 1898.

Attest:

J. M. SMITH,
Clerk Lyon County Court.

Copy Articles of Incorporation of Ewald Iron Company.

561 Be it remembered that at a Court of Appeals held as aforesaid on 16th day of November 1915, the following order was entered, to-wit:

Jefferson.

Ord. Sub.

COMMONWEALTH, By &c.,

vs.

EWALD'S EXECUTOR.

EWALD'S EXECUTOR

vs.

CITY OF LOUISVILLE, &c.

These cases coming on to be heard were argued by E. F. Trabue for the Commonwealth and Lyon County, George Cary Tabb, for the City of Louisville and W. W. Crawford for Ewald's Ex'r, and the cases are submitted.

Be it remembered that on the 25th day of January 1916, the following judgment was entered herein, to-wit:

Judg't.

E. P. EWALD'S EXECUTOR, Appellant,

vs.

CITY OF LOUISVILLE, Appellee.

Appeal from Jefferson Circuit Court.

The court being sufficiently advised it seems to it that there is no error in the judgment herein.

It is therefore considered that the judgment of the lower court be affirmed by a divided court with 10% damages on the amount of the judgment superseded therein. Which is ordered certified to said court. It is further adjudged that the appellee recover of the appellant its cost herein expended.

562 At the same time the court delivered an opinion herein in words and figures as follows, to-wit:

January 25th, 1916.

Opinion.

Court of Appeals of Kentucky.

L. P. EWALD'S EXECUTOR, Appellant,

v.

CITY OF LOUISVILLE, Appellee.

COMMONWEALTH OF KENTUCKY, Appellant,

v.

L. P. EWALD'S EXECUTOR, Appellee.

Appeals from Jefferson Circuit Court (Chancery Branch, Second Division).

Opinion of the Court by Judge Carroll, Affirming in Each Case.

A majority of the members of the court finding themselves unable to agree as to the judgment that should be entered in these cases, the judgments appealed from must stand affirmed. But in view
563 of the unusual and peculiar situation, involved we have thought it proper to set out shortly the facts in the case and briefly the points of differences between the judges that prevent a majority of the court, or four of the judges, from agreeing on an opinion.
The Ewald Iron Co. was incorporated under the laws of Kentucky

on November 5, 1880. The articles of incorporation specified that the corporation should expire in twenty-five years, or on November 5, 1905. The articles of incorporation further specified that the principal office and place of business of the corporation should be in Lyon county and the company conducted its business, which was the manufacture of iron, in Lyon county until 1886, when it removed its business to the city of Louisville, in Jefferson county. The company owned a large body of land in Lyon county and yet owns it but after 1886 it did not carry on in any manner or form the business of manufacturing iron in Lyon county. In fact its business in this respect was a completely removed to Louisville and there carried on as if it had never established or maintained a plant in Lyon county.

From the time of the removal to Louisville until the expiration of the charter in 1905, the entire business of the company in this state was carried on in the name of the company in Louisville, although the corporate home of the company, under the articles of incorporation, continued to be in Lyon county. When the life of the corporation expired on December 5, 1905, the business continued to
 564 be conducted in the name of the Ewald Iron Co., at Louisville, Kentucky, exactly in the same manner that it had been conducted during the life of the corporation, and this method of conducting the business continued without interruption until September, 1909.

Prior to 1904 L. P. Ewald, by purchase of the stock became the sole stockholder of the company and so continued to be until his death in July 1909, and during all of this time, and for many years prior thereto, he had been continuously a resident of the city of Louisville.

For the years 1904 to 1908, inclusive, the Ewald Iron Co. listed for taxation in its name the land in Lyon county and paid the taxes assessed thereon, but did not, during any of these years, list for taxation or pay taxes on the money sought to be subjected to the payment of taxes in these proceedings.

From the time of the removal of the business of the company to Louisville in 1886 until after the death of Ewald, in 1909, the company paid taxes to the city of Louisville and the State on its manufacturing plant and other tangible property located in the city of Louisville, but did not at any time list for assessment or pay any taxes on the money sought to be assessed in these proceedings. L. P. Ewald, although the sole owner of the

Ewald Iron Co., continued to conduct all the business connected with the manufacturing plant in the name of the
 565 Ewald Iron Co., until his death in 1909; and the money

sought to be subjected in these proceedings to taxes for the years 1904 to 1908, inclusive, was on deposit in four different banks in St. Louis, Mo., in the name of and to the credit of Ewald Iron Co., there being to its credit on September 1, 1903 \$842,310.25; on September 1, 1904, \$1,038,152.09; on September 1, 1905, \$1,355,799.96; on September 1, 1906, \$1,629,836.36; on September 1, 1907, \$1,837,404.48; and the taxes due on this money were payable in the year following the assessment.

It further appears that in all of these years St. Louis, Mo., was the distributing point for the product of the Ewald Iron Co. manufactured in Louisville, Ky. In other words, the Ewald Iron Co. maintained an office in St. Louis, and all of its product was sold through this office, and the proceeds of sales paid into this office. It also appears that during these years all of the money on deposit in these four banks had been placed on deposit in the name of the Ewald Iron Co. by the direction of L. P. Ewald, and that it was at all times subject to checks drawn by him in the name of the Ewald

Iron Co., and that no part of this fund so on deposit in these 566 banks was used in the business of the company. The money

needed in the business of the company carried on in St. Louis was kept on deposit in another bank, and whenever any money was needed to carry on the business of the Ewald Iron Co., it was obtained by check drawn on this other bank in which the deposit was from time to time replenished as the necessities of the business required. In short, the money mentioned, on deposit in the four banks, appears to have been accumulated from surplus earnings of the Ewald Iron Co. that were not needed in the conduct of its business.

In 1910, after the death of Ewald, and five years after the life of the corporation had expired, a revenue agent for the State instituted an action in Lyon county court against the Ewald Iron Co. seeking to have listed for taxation as admitted property, as of September 1, 1909, \$1,800,000 on deposit in St. Louis banks to the credit of the Ewald Iron Co. The county court entered a judgment assessing the property, and on an appeal to the circuit court, the judgment of the county court was sustained. From this judgment an appeal was taken to this court and the opinion of this court may be found in 140 Ky., 692.

567 It appears from the opinion in this case that the assessor of the city of Louisville and Jefferson county, claiming that this money sought to be assessed in Lyon county, and which was on deposit in the St. Louis banks in the name of the Ewald Iron Co., was in fact the money of L. P. Ewald estate, assessed is as of September 1, 1909 in the name of L. P. Ewald's executor. On the appeal to this court, the attorney for the city of Louisville, although neither the city of Louisville, nor Jefferson county was a party to the suit, appeared by permission of the court in the case and insisted that the Jefferson county assessment should be sustained.

As said by the court in the opinion, "The only question made is whether it should be assessed as the property of the Ewald Iron Co., in Lyon county, or in the name of L. P. Ewald, in Jefferson county. It is agreed that Lyon county was the residence of the corporation, and if the property should be assessed in its name, it must be assessed there. It is also agreed that Jefferson county was the residence of L. P. Ewald, and if the property should be assessed in his name it should be assessed in Jefferson county."

Section 561 of the Kentucky Statutes provides, in part, 568 "And when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing

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up its business, but for no other purpose; it shall be the duty of the officer to settle up its affairs and business as speedily as possible." Construing this statute, the court in question said:

"When the charter of the Ewald Iron Co. expired it wholly disregarded the statute. It did not proceed in any sense to close up its business, and took no steps in this direction, but continued to do business just as it had before in disregard of the statute. * * * When, as in this case, the corporation continues to act and carry on its business as before, taking no steps to close up after the articles of incorporation have expired, the stockholders are simply doing business as partners. They are personally liable for all debts made, and acts done are not the acts of the corporation but the acts of the stockholders. The situation for the purposes of taxation is precisely the same as in any other case of partnership; that is, the property should be given in for taxation in that county where it would be given in for taxation if the parties had done business under a firm name and not under the name of a corporation. * * *

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"It is true that there was only one stockholder in this case, but the fact that there was but one stockholder does not change the legal aspect of the case. L. P. Ewald was simply doing business in the name of the Ewald Iron Co., not as a corporation, for the corporation had expired, but for himself; and for the purpose of taxation the rights of the parties are not different from what they would be if he had done business in the name of L. P. Ewald & Co. He was the sole stockholder; he had charge of the corporation. Having control of the corporation he did not wind it up, and, in disregard of the statute, continued to do business in that name, thus failing to give in the property for taxation as his property at his residence. * * * The money had no situs in St. Louis; it was simply deposited there. It was personal property which followed the person and was subject to taxation at the domicile of the owner. The owner of the property on September 1, 1909, was L. P. Ewald's executor and its domicile was in Louisville."

The court further said: "While the existence of the corporation continues after the expiration of its articles of incorporation, for the purpose of winding up its business, this continuance of its existence is for that purpose and no other. The continued existence of the corporation cannot be extended by the failure of its officers to comply with the statute. They have a reasonable time,

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to wind up its business, and when such reasonable time has expired, they cannot be heard to say that the corporation is still in existence, and thus defeat their liability for taxes at their residence. After the expiration of a reasonable time for closing up the business of the corporation, it is not in existence under the statute, and the title to its property vests in the stockholders for the purpose of taxation. * * * Two years is a reasonable time ordinarily for closing up the business of a corporation, and where the provisions of the statute are entirely disregarded, the parties will not be heard to say that two years is not a reasonable time, we, therefore, conclude that the corporate existence of the Ewald Iron Co. expired for all purposes

long before the death of L. P. Ewald, and that the money here in controversy is taxable as his property at his residence."

In the extended opinion that may be found in 142 Ky., 465, the court said: "The corporation expired for business purposes on November 5, 1905. The property held in the name should be taxed in its name and as its property until November 5, 1907; after that time it should be taxed in the name of L. P. Ewald, and as his property."

571 After these opinions were handed down, the Ewald estate, in compliance with the rule announced in these opinions, paid the taxes assessed against the Ewald Iron Co., for the years 1909 and 1910, in Louisville, Jefferson County. So that the taxes for these years are not in controversy.

While the case mentioned was pending in this court, Lyon county and the Commonwealth, through a revenue agent, instituted proceedings in Lyon county for the benefit of the Commonwealth and Lyon county against the executors of Ewald, seeking to assess this St. Louis money for the years 1907 and 1908, as of the taxing dates of September 1, 1906, and September 1, 1907, on the theory that it was the money of the Ewald Iron Co. and consequently had a taxable situs in Lyon county. The city of Louisville also instituted proceedings against the estate of Ewald seeking to assess this money for the years 1904 to 1908, inclusive, upon assessments made as of September 1, 1903-1907, inclusive, on the theory that this St. Louis money, although deposited in the name of the Ewald Iron Co., was, in fact and in truth the individual property of L. P. Ewald, and therefore subject to taxation at the place of his residence.

A judgment was given in Lyon county against the estate, requiring it to pay the taxes charged for the years 1907 and 1908; 572 and a judgment was also given in Louisville against the estate requiring it to pay the taxes for the years 1904-1908, inclusive. From these judgments the estate prosecuted appeals to this court and the two cases were heard and disposed of in one opinion that may be found in 159 Ky., 323. In that opinion reversing each of the judgments, the court said:

"So that we have before us the consideration — two judgments of two different courts assessing the same property at two different places for the same years, and in neither of the cases was the plaintiff in the other case a party. * * * Manifestly this property was not taxable at both places, and if both judgments should be affirmed, a great injustice would be done to the Ewald estate: if the Louisville judgment and the Lyon county judgment reversed, it would be in effect fixing the taxable situs of this property in Louisville under the evidence taken in a case to which Lyon county and the Commonwealth were not parties; if the Lyon county judgment should be affirmed and the Jefferson county case reversed, it would be in effect fixing the taxable situs of this money in Lyon county as against the city of Louisville, in an action to which it was not a party. Under the state of these records as we find them, it is impracticable, if not impossible, to pass upon these cases on their merits. * * *

573 We have deemed it proper to reverse both of these judgments, and direct that the Lyon county case be transferred to the

Jefferson circuit court and there consolidated with the Jefferson county case, so that the issues between the parties may be made and determined in the proper way."

In conformity to this opinion the Lyon county case was transferred to the Jefferson circuit court and heard and disposed of by the Jefferson circuit court in connection with the Louisville case. The judgment of that court was that this St. Louis money had a situs for taxation in Louisville, Ky., for the years 1904 to 1908, inclusive, and the estate of Ewald was adjudged to pay the city of Louisville the taxes due for these years. From the judgment the Commonwealth and Lyon county prosecute an appeal, and the Ewald estate also prosecutes an appeal, insisting that this money did not have a taxable situs in this State in any of these years, but that if it had a taxable situs in this State, that situs was in Lyon county, Kentucky.

574 On the facts we all agree that the money in St. Louis had a situs in this State for taxation; and Chief Justice Miller and Judges Turner and Clarke are of the opinion that the judgment of the Jefferson circuit court should be affirmed in its entirety, upon the ground that the money sought to be taxed was, during all of these years, in fact the money of L. P. Ewald and not the money of the Ewald Iron Company; that although it was on deposit in St. Louis banks in the name of and to the credit of the Ewald Iron Co., it had been deposited by direction of L. P. Ewald and was subject — withdrawal only by him; that it was not used in carrying on the business of L. P. Ewald Iron Company; that it was placed on deposit to the credit of the Ewald Iron Company by L. P. Ewald in an effort to evade the tax laws of this State and to prevent it from being subjected to the taxes assessed L. P. Ewald.

Judges Settle, Hurt and Carroll are of the opinion that the money on deposit in the St. Louis banks in the name of the Ewald Iron Co., and which had been made in the business conducted by this company, had a taxable situs at the charter home of the Ewald Iron Co., in Lyon county during the life of the corporation, and until Nov. 5, 1905, and consequently the taxes payable in the years 1904, 1905

575 and 1906 were due in Lyon county; but that after the life of the corporation expired, and on the assessing periods of September 1, 1906, and 1907, this money had a taxable situs

at the home of L. P. Ewald in Louisville, and therefore the taxes due in 1907 and 1908 payable in Louisville, Kentucky. They are further of the opinion that the rule laid down in the opinion in 140 Ky. and 142 Ky., that the property of a corporation has a taxable situs at the home of the corporation for two years after its corporate life has expired, applies only when the corporation is a going concern at the time its articles of incorporation expire and there is some reason why it should be allowed time in which to wind up its business, and do not apply to a case like this in which the corporation had no business of any kind to wind up when its life expired.

Judge Thomas is of the opinion that the decision of this court in 140 Ky. and in the extended opinion in 142 Ky., are binding and conclusive on the question that the Ewald Iron Co. continued in

existence at its corporate home in Lyon county for two years after the expiration of the articles of incorporation; and this being so, this money, which was derived from the business of the Ewald Iron Co. and was on deposit in the St. Louis banks in the name of this company, had a taxable situs at the corporate home of the company in Lyon county until November 5, 1909; or, in other words at the assessing periods of September 1, 1906, and 1907, and therefore the taxes due in 1907 and 1908 should be paid in Lyon county.

The judgment in each case is affirmed by a divided court.

576 Gibson & Crawford, Louisville, Ky., for Ewald's Executor.
Pendleton Beckley, Geo. Cary Tabb, Stuart Chevalier, Louisville, Ky., for City of Louisville.

Hodges & James, Eddyville, Ky.; John C. Duffy, M. H. Thatcher, Trabue, Doolan & Cox, Louisville, Ky., for Commonwealth & Lyon County.

577 Be it remembered that on the 17th day of October, 1916, the court delivered an opinion herein in words and figures as follows:

578 October 17, 1916.

Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by ———, et al, Appellant,
v.

FIDELITY & COLUMBIA TRUST Co., Executor, et al., Appellees.

Appeal from Jefferson Circuit Court (Chancery Branch, Second Division).

Opinion of the Court by Judge Carroll, Affirming.

In a suit that was pending in the Jefferson Circuit Court the question at issue was whether Ellen J. Ewald was the lawful wife of L. P. Ewald, and it was adjudged by the court in the case that Ellen J. Ewald was the lawful wife of L. P. Ewald at the time of his death. Following this judgment there was paid to Ellen J. Ewald, as the widow of L. P. Ewald, three hundred thousand dollars as her distributable share of his estate in a compromise settlement effected between the parties in interest.

After this the Commonwealth, by a revenue agent, instituted in the County Court of Jefferson county a proceeding to charge this
579 sum with an inheritance tax. The proceeding was dismissed in the County Court and also in the Circuit Court to which an appeal was prosecuted, and from the judgment of the Circuit Court the case has been brought here.

Section 4281a of the Kentucky Statutes provides, in part, that "All

property which shall pass, by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, * * * or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor or bargainor, or intended to take affect in possession or enjoyment after such death, to any person or persons * * * other than to or for the use of his or her father, mother, husband, wife, lawful issue, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the Commonwealth of Kentucky, and any lineal descendant of such decedent born in lawful wedlock, shall be, and is, subject to a tax of five dollars of every hundred dollars of the fair cash value of such property."

580 It would seem that the judgment of the Jefferson Circuit Court, which stands unreversed and unmodified—declaring

Ellen J. Ewald to have been the wife of L. P. Ewald at the time of his death, and the statute which exempts from an inheritance tax property received by a wife would be sufficient to determine the correctness of the judgment appealed from. But, notwithstanding the irrefutable reasons furnished by the judgment and the statute why the Commonwealth should not recover the inheritance tax, counsel for the Commonwealth argue that because the Commonwealth was not a party to the litigation in which Ellen J. Ewald was adjudged to be the wife of L. P. Ewald, this judgment is not conclusive on the Commonwealth and it has the right in this collateral proceeding to open up the controversy and have re-litigated the question whether this woman was, in fact, the wife of L. P. Ewald at the time of his death.

It is, however, so plain that the judgment cannot be upset in this collateral proceeding that we need not cite any authority in support of the conclusiveness of the judgment. It may not, however, in this connection be amiss to say that a case might arise in which the Commonwealth would not be bound by a judgment in a suit or proceeding to which it was not a party when by the judgment

581 it was deprived of taxes to which, except for the judgment, it would be entitled. But this condition could only arise when the judgment was fraudulent or collusive and rendered with the purpose of defeating the Commonwealth in the collection of its taxes: *Com. v. Helm*, 163 Ky., 69.

But in the case we have, even if the Commonwealth had charged and succeeded in establishing that the judgment was fraudulent and collusive and that Ellen J. Ewald was not the wife of L. P. Ewald, it would not authorize the imposition of an inheritance tax on what was paid her, because if she was not his wife, she had no interest in and was a stranger to the estate. And this being so, what was paid to her would not be subject to the inheritance tax, as under section 4281a only property that passes by will, or by the intestate laws of the State, or that is transferred by deed, grant, sale or gift in contemplation of the death of the grantor or bargainor, is subject to the tax: *In re Estate of Granves Estate*, 242 Ill., 212; *English's Estate v.*

Crenshaw, 120 Tenn., 531; Matter of Cook, 187 N. Y., 253; Hawley's Estate, 214 Pa. St., 525; In re Estate of Wells, 142 Ia., 255.

Wherefore, the judgment is affirmed.

Matt J. Holt, Louisville, Ky.; A. Scott Bullitt, County Attorney, Louisville, Ky.; J. C. Duffy, Frankfort, Ky., Attorneys for Appellant.
O'Doherty & Yonts, Louisville, Ky., Attorneys for Appellee.

582 October 17, 1916. Court of Appeals of Kentucky.

EWALD'S EXECUTOR, Appellant,

v.

CITY OF LOUISVILLE, Appellee.

COMMONWEALTH OF KENTUCKY, Appellant,

v.

EWALD'S EXECUTOR, Appellee.

Appeal from Jefferson Circuit Court (Chancery Branch, Second Division).

Response to petition for Rehearing by Judge Carroll.

In response to the petition for a re-hearing filed by counsel for the Ewald estate, so much of the opinion in these cases that may be found *in* 168 Ky., 71, as recites that "The judgment in each case is affirmed by a divided court," is withdrawn, because it does not correctly represent the views of the members of the court as set out in the opinion.

On a re-consideration of the cases the members of the court adhere to the conclusions ascribed to them in the opinion, and this being so it will be seen that Judge Settle, Hurt, Thomas and Carroll are of the opinion that the money sought to be taxed had a situs for taxation in Lyon county, and not in the city of Louisville,

at the assessing periods in 1903, 1904 and 1905, and that
583 all the court except Judge Thomas are of the opinion that it had a situs for taxation in the city of Louisville at the assessing periods in 1906 and 1907. It results from this that so much of the judgment as holds that the money had a situs for taxation in Louisville in 1904, 1905 and 1906 must be reversed. In other respects the judgment is affirmed, as Lyon county is not seeking in these cases to tax the money in that county for the years 1904, 1905 and 1906.

Wherefore, the judgment is reversed, with directions to enter a judgment in conformity with this opinion.

Hodges & Johnson, Eddyville, Ky., Trabue, Doolan & Cox, Louisville, Ky., Attorneys for Appellant.

Pendleton Beckley, Louisville, Ky., G. Cary Tabb, Louisville, Ky., Stuart Chevalier, Louisville, Ky., Attorneys for Appellee, City of Louisville.

Gibson & Crawford, Louisville, Ky., Attorneys for Appellee Fidelity & Columbia Trust Co.

H. A.

[Endorsed:] Ewald's Ex'tor vs. City of Louisville, 10/17/16.

584 Be it remembered that on the 20th day of October 1916 the following order was entered herein:

Ord. Fil. Pet. Mod., &c.

EWALD'S EXECUTOR

VS.

CITY OF LOUISVILLE.

Came appellee by counsel and filed petition for extension and modification of opinion with notice.

Be it remembered that on the 25th day of October 1916 the following order was entered herein:

Ord. Fil. Response.

EWALD'S EXECUTOR

VS.

CITY OF LOUISVILLE.

Came appellant by counsel and filed response for modification of opinion with notice.

Be it remembered that on the 28th day of November 1916, the following order was entered herein:

EWALD'S EXECUTOR

VS.

CITY OF LOUISVILLE.

COMMONWEALTH OF KENTUCKY

VS.

EWALD'S EXECUTOR.

The court being sufficiently advised modified the opinion and delivered a response.

The response referred to in the foregoing order is as follows:

585 Court of Appeals of Kentucky, November 28, 1916.

EWALD'S EXECUTOR, Appellant,

VS.

CITY OF LOUISVILLE, Appellee.

COMMONWEALTH OF KENTUCKY, Appellant,

VS.

EWALD'S EXECUTOR, Appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Response to the Petition for Modification and Extension of the Opinion Rendered October 17, 1916.

By Judge THOMAS:

The petition for modification and extension of the opinion rendered herein, which opinion is found in 171 Ky., 509, calls our attention to the fact that in that opinion we overlooked certain personal property belonging to the estate of L. P. Ewald which he had failed to list for taxation for the taxing years of 1904, 1905 and 1906.

The opinion referred to seems to have only decided that the 585½ estate of Ewald was not liable for the personal property held in the name of Ewald Iron Company for those years. The record shows that at the assessing periods for those years Mr. Ewald was the owner of other personal property besides the money on deposit in the name of the Ewald Iron Company, and which had failed to be assessed for taxation for either of the years mentioned. This property consisted of 850 shares of the capital stock of Helmibacher Forge and Rolling Mill Company, and 500 shares of the capital stock of Granby Mining and Smelting Company, and perhaps other personalty. The proceedings are broad enough to authorize the court to assess this property for taxation for the above named years, and, under the testimony, it clearly had a right to do so. The fact that the stock in these corporations was kept by the owner in some safety vault in the city of St. Louis, Missouri, does not deprive it from having a situs for taxation in the city of Louisville, Kentucky, the home of Ewald. It results, therefore, that the opinion, when it denied the city the right to any taxes for those years, went further than the facts justified, and the petition for modification is sustained to the extent that the judgment should tax all the personal property belonging to the decedent for the years mentioned, except the money on deposit in St. Louis banks in the name of the Ewald Iron 586 Company. In other respects it is overruled, and the mandate should be corrected so as to conform herewith. Upon the

return of the case, the value of the stocks mentioned, and other personal property, if any, owned by Ewald in his individual name at the assessing periods for those years, should be fixed by the court and judgment rendered accordingly.

Gibson & Crawford, Attorneys for Ewald's Ex'r, Louisville, Ky.
Pendleton Beckley, Louisville, Ky., Geo. Cary Tabb, Louisville, Ky.,
Stuart Chevalier, Louisville, Ky., Attorneys for the City of Louisville, Louisville, Ky.

Hodges & James, Eddyville, Ky., Jno. C. Duffy, Hopkinsville, Ky.,
M. H. Thatcher, Louisville, Ky., Trabue, Doolan & Cox, Louisville, Ky., Attorneys for the Commonwealth of Kentucky.

[Endorsed:] Ewald Ex'r vs. City of Louisville, Com'th of Ky.
vs. Ewald Ex'r. 11/28/16.

587 And then on the 27th day of December, 1916, the following
Mandate was issued herein:

THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals:

Nov. 28th, 1916.

L. P. EWALD, Ex'or, Appellant,

against

CITY OF LOUISVILLE, Appellee.

Appeal from a Judgment of the Chancery Branch, 2nd Div., Jefferson Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed, and cause remanded, for proceedings consistent with opinion rendered herein on October 17th, 1916, and extended opinion rendered herein on November 28th, 1916.

Which is ordered to be certified to said Court.

A copy.

Attest:

R. W. KEENON, C. C. A.

By ———, D. C.

Issued Dec'r 27th, 1916.

588 And on said date, to-wit, January 4th, 1917, there was
filed in the office of the Clerk of the Court of Appeals a
Petition for a Writ of Error, and which is attached hereto and is as
follows:

Petition for Writ of Error from the Supreme Court of the United States to the Court of Appeals of Kentucky.

FIDELITY & COLUMBIA TRUST COMPANY, as Executor & Trustee of the Estate of L. P. Ewald, Deceased, Plaintiff in Error,

vs.

CITY OF LOUISVILLE, Defendant in Error.

Pet. for Writ of Error.

To the Honorable Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky:

The Petitioner, Fidelity & Columbia Trust Company, as Executor and Trustee of the estate of L. P. Ewald, says it is a corporation duly organized and existing under the laws of the Commonwealth of Kentucky with power to sue and to be sued and act as Executor and Trustee, and do all acts necessary and proper to carry out the duties of an Executor and Trustee.

It says that L. P. Ewald, a resident of Jefferson County, Kentucky, died testate in Jefferson County in July, 1909, and that thereafter his will appointing this petitioner Executor and Trustee of his estate was duly probated in the Jefferson County, Kentucky, and 589 that this petitioner thereafter qualified as Executor and Trustee of the estate of L. P. Ewald, and has ever since been and is now duly qualified and acting Executor and Trustee of said estate.

The petition says that in November, 1910, the City Assessor of the City of Louisville, acting under the supposed authority of the statute law of the State of Kentucky relating to municipal corporations of the first class as set forth in Section 2991, Kentucky Statutes, Carroll's Edition, 1915, made a retrospective assessment against the estate of L. P. Ewald of \$1,550,000 for taxes for the year 1907, and \$1,850,000 for taxes for the year 1908. It says that the City of Louisville and theretofore filed its action in the Jefferson Circuit Court in Jefferson County, Kentucky, seeking to recover from it as Executor and Trustee of the estate of L. P. Ewald, taxes retrospectively assessed against the estate of L. P. Ewald for the years 1904, 1904 and 1910, and after the making of the retrospective assessment heretofore first referred to, amended its petition in said suit and sought to recover taxes against this petitioner as such Executor and Trustee for the year 1907 amounting to \$27,900 with interest from May 1, 1911, and ten per cent penalty thereon, and taxes for the year 1908 amounting to \$32,375 with interest from May 1, 1911, and ten per cent penalty thereon, on account of said assessment. It says that the property sought to be assessed by the City of Louisville in this proceeding, especially for the year- 1907 and 1908 was, as of September 1, 1916, for the tax year 1907, -1,629,836.36 on permanent

590 deposit in banks in St. Louis, Missouri, belonging to a corporation organized under the laws of the State of Kentucky styled Ewald Iron Company, and as of September 1, 1907, for the tax year 1908, \$1,837,404.48 on permanent deposit in banks in St. Louis, Missouri, belonging to a corporation organized under the laws of the State of Kentucky, styled Ewald Iron Company.

This petitioner says that the Ewald Iron Company has paid taxes on all of its property actually located in the State of Kentucky, and all of its property actually located in the City of Louisville in said State.

It says that thereafter, in said action, this petitioner filed its answer denying any liability for its testator or for it on account of its testator's estate on account of said assessments and especially setting up that the money sought to be taxed by the city of Louisville was money permanently on deposit in banks in St. Louis, Missouri, and had never been in Kentucky, and belonged to the Ewald Iron Company, a corporation organized and existing under the laws of the State of Kentucky, which corporation had paid taxes on all of its property in Kentucky, and arose out of business done by said corporation in Missouri.

Petitioner further set forth in its answer to said suit that said Kentucky corporation had maintained a branch in Missouri from which point it sold its manufactured product and other products purchased in Missouri by it, and that all the money on deposit in banks sought to be covered by the retrospective assessment, arose from business done elsewhere than in Kentucky and was
591 neither permanently used in the business in Missouri or on deposit in banks in Missouri, either on certificates of deposit of *deposit* or general accounts, and had never acquired any situs in Kentucky, but had *required* a business and permanent situs in Missouri, and to tax it in Kentucky, either by the State of Kentucky or a taxing arm of said State, would be a violation of its guarantees under the Constitution of the United States and a deprivation of the property of its testator's estate without due process of law. Petitioner likewise, in said answer, set forth the fact that the uniform construction placed upon the tax laws of the Commonwealth of Kentucky by the highest court of the State of Kentucky, to-wit, the Court of Appeals of Kentucky, was that property acquiring a business situs elsewhere, whether tangible or intangible, was not subject to taxation in the State of Kentucky. That among the cases so holding were Louisville & Jeffersonville Ferry Co. vs. Kentucky, 188 Ky., 397; Commonwealth vs. R. G. Dunn & Co., 126 Ky., 111; Commonwealth vs. West India Oil Co., 138 Ky., 828; Commonwealth vs. Kentucky Distilleries & Warehouse Co., 143 —, 314; Commonwealth vs. Avery & Sons, 163 Ky., 828, and that the rules announced in said cases have never been set aside, modified or changed.

This petition says that in its said answer it further set forth that to tax the money in banks in St. Louis belonging to the Ewald Iron
592 Company, as the property of L. P. Ewald would be to not give its testator's estate the benefit of the uniform of taxation applied in Kentucky, and would be — violation of its guaran-

tees under the Constitution of the United States by depriving its testator's estate and it as the representative thereof of the equal protection of the law.

The petition says that thereafter, upon the trial of said action judgment was rendered against it for taxes on said money on permanent deposit in St. Louis, Missouri, for the year 1907 amounting to \$27,900 with interest from May 1, 1911, and ten per cent penalty, and for the year 1908 amounting to \$32,375 with interest from May 1, 1911, and ten per cent penalty.

Thereupon this petition- appealed said cause to the Court of Appeals of Kentucky, which rendered final judgment affirming said case against your petitioner, and issued its mandate accordingly on December 27, 1916.

Petitioner says that the Court of Appeals of Kentucky is the highest Court of Law or Equity in said State of Kentucky; that the judgment appealed from presents a Federal question in this case, namely, that it deprives this petitioner of its guarantees under the Constitution of the United States that its property will not be taken without due process of law, and denies to the petitioner the equal protection of the law.

Wherefore your petitioner prays that a writ of error may issue and a citation be granted and signed; that the bond herewith presented be approved, and that the errors complained of may be reviewed by the Supreme Court of the United States and the judgment of the Court of Appeals of Kentucky reversed.

FIDELITY & COLUMBIA TRUST
COMPANY,

*Executor & Trustee of the Estate
of L. P. Ewald, Deceased,*

By Its Attorneys in Law and Fact, CHARLES H. GIBSON,
WILLIAM C. CRAWFORD,
Attorneys for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed, this 4th day of January, 1917.

Bond is fixed at the sum of \$1,000.00.

Dated at Frankfort, Kentucky, this 4th day of January, 1917.

W. E. SETTLE.

Chief Justice Court of Appeals of Kentucky.

[Endorsed:] January 4th, 1917. Filed. R. W. Keenon, C. C. A.

594 & 595 Be it remembered, that afterwards, to-wit, on the 4th day of January 1917, the Appellant Fidelity & Columbia Trust Company as Executor and Trustee of the Estate of L. P. Ewald, filed in the office of the Clerk of the Court of Appeals of Kentucky an Assignment of Errors which is in words and figures as follows, to-wit:

Assignment of Errors.

FIDELITY & COLUMBIA TRUST COMPANY, as Executor and Trustee of
the Estate of L. P. Ewald, Deceased, Plaintiff in Error,

vs.

CITY OF LOUISVILLE, Defendant in Error.

Assign. of Error.

Now comes the plaintiff in error, Fidelity & Columbia Trust Company, as Executor and Trustee of the estate of L. P. Ewald, deceased, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of Kentucky in the above entitled matter, there is manifest error in this, to-wit:

1. In holding that the defendant in error had the right to consider as property subject to assessment in the State of Kentucky or in the City of Louisville in said State, money permanently on deposit in banks in the State of Missouri, which money arose out of
596 business done in the State of Missouri, and had acquired a business situs there, and was never at any time within the territorial limits of the State of Kentucky, but was deposited in banks in Missouri by a Kentucky corporation doing business in Missouri.

2. The Court of Appeals of Kentucky erred in deciding that the law under which municipal corporations of Kentucky were authorized to make retrospective assessments authorized the City of Louisville to tax bank deposits not within the territorial limits of the City of Louisville, State of Kentucky.

3. That the Court of Appeals of Kentucky erred in not affording the plaintiff in error equal protection of the laws of the Commonwealth of Kentucky by holding that money or property, whether tangible or intangible, which had acquired a situs outside of the State of Kentucky, although belonging to a resident of Kentucky, was not subject to taxation within the State of Kentucky.

4. The Court of Appeals of Kentucky erred in deciding that in fixing the assessment of the plaintiff in error, the Jefferson Circuit Court did not violate the Constitution of the United States particularly the Fourteenth Amendment thereof, and did not deprive the plaintiff in error of its property without due process of law.

5. The Court of Appeals of Kentucky erred in failing to hold that in fixing the assessment against the plaintiff in error, the Jefferson Circuit Court violated the Constitution of the United States, and particularly the Fourteenth amendment thereof, by failing to afford
597 plaintiff in error equal protection of the laws.

6. The Court of Appeals of Kentucky erred in rendering
judgment in said cause in favor of the defendant in error and against the plaintiff in error.

Wherefore, the plaintiff in error, Fidelity & Columbia Trust Company, Executor and Trustee of the estate of L. P. Ewald, deceased, prays that the judgment and decision of said Court of Appeals of

Kentucky and of said Circuit Court of Jefferson County, Kentucky, may be reversed and held for naught, and that it may be restored to all things it has lost by reason thereof.

CHARLES H. GIBSON,

WILLIAM W. CRAWFORD,

*Attorneys and Counsel for the Fidelity
& Columbia Trust Company, execu-
tor and Trustee of the Estate of L. P.
Ewald, Deceased.*

[Endorsed:] 1917 January 4th filed. R. W. Keenon, C. C. A.

598 And then on the same day, to-wit, January 4th, 1917, the following Writ of Error was filed herein, which is in words and figures as follows:

Writ of Error.

FIDELITY & COLUMBIA TRUST COMPANY, as Executor and Trustee of the Estate of L. P. Ewald, Deceased, Plaintiff in Error,

vs.

CITY OF LOUISVILLE, Defendant in Error.

Writ of Error.

The President of the United States of America to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is, in the said Court of Appeals of Kentucky, before you or some of you, being the highest Court of Law or equity of said State in which a decision could be had in said suit between the Fidelity & Columbia Trust Company as Executor and Trustee of the estate of L. P. Ewald, deceased, and the City of Louisville a manifest error has happened to the great damage of the said Fidelity & Columbia Trust Company as Executor and Trustee of the estate of L. P. Ewald, as by its complaint appears, and wherein its claim that it has certain rights and privileges under the

599 Constitution of the United States was decided against by your said Court, and your said Court has decided in favor of a certain authority exercised under the State of Kentucky and an arm thereof, and which said authority and exercise thereof were repugnant to the Constitution of the United States; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd day of February next in the said Supreme Court, to

be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 4th day of January, A. D. 1917.

[SEAL.]

JNO. W. MENZIES,

Clerk District Court of the United States for the Eastern District of Kentucky, at Frankfort.

By CHAS. N. WIARD, D. C.

Allowed by

W. E. SETTLE,

Chief Justice Court of Appeals of Kentucky.

600 [Endorsed:] 1916 January 4th filed. R. W. Keenon,
C. C. A.

601 And then on the same day, to-wit, the following Citation was filed herein, which is as follows:

Citation.

UNITED STATES OF AMERICA, *ss.*

To the City of Louisville, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein the Fidelity & Columbia Trust Company as Executor and Trustee of the estate of L. P. Ewald, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky, this 4th day of January, A. D. 1917.

W. E. SETTLE,

Chief Justice Court of Appeals of Kentucky.

Copy of the within Citation received this 4th day of January, A. D. 1917, at the office of the undersigned and accepted on behalf of the City of Louisville with the same force and effect as if served on it.

602

PENDLETON BECKLEY,
GEO. CARY TABB,
STUART CHEVALIER,
Attorneys for City of Louisville.

[Endorsed:] 1917 January 4th filed. R. W. Keenon, C. C. A.

And then on the 4th day of January, 1917, the following Praecipe, was filed herein which is as follows:

603 And then on the same day, to-wit, January 4th, 1917, the following Writ of Error Bond was filed herein, to-wit:

Bond.

FIDELITY & COLUMBIA TRUST COMPANY, as Executor and Trustee of the Estate of L. P. Ewald, Deceased, Plaintiff in Error,

vs.

CITY OF LOUISVILLE, Defendant in Error.

Bond.

Know all men by these presents: That we, the Fidelity & Columbia Trust Company, as Executor and Trustee of the estate of L. P. Ewald, deceased, as principal, and National Surety Company, as surety, are held and firmly bound unto the City of Louisville in the sum of \$1,000.00 to be paid to said obligee, its successors and assigns, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 4th day of January, A. D. 1917.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky.

604 Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

FIDELITY & COLUMBIA TRUST
COMPANY,

*As Executor and Trustee of the Estate
of L. P. Ewald, Deceased,*

By CHARLES H. GIBSON,
WILLIAM W. CRAWFORD,

Its Attorneys.

[SEAL.]

NATIONAL SURETY COMPANY,
By R. W. KEENON,

Its Attorney in Fact.

Signed, sealed and delivered in the presence of:

R. W. KEENON, *Clerk.*

Approved this 4th day of January, 1917.

W. E. SETTLE,
Chief Justice of Kentucky Court of Appeals.

[Endorsed:] 1917 January 4th filed. R. W. Keenon, C. C. A.

605

Præcipe.

FIDELITY & COLUMBIA TRUST COMPANY, as Executor and Trustee of
the Estate of L. P. Ewald, Deceased, Plaintiff in Error,

vs.

CITY OF LOUISVILLE, Defendant in Error.

Præcipe.

It is agreed between the plaintiff in error and defendant in error that in making the transcript of the within case for the purpose of transmission to the Supreme Court of the United States, the following are the only parts of the record that need be copied, and are all the papers necessary to present the question covered by the assignment of errors on this appeal.

Petition filed September 15, 1910, and any exhibits therewith.

Answer filed November 19, 1910.

Amended petition filed March 31, 1911.

Order of March 31, 1911.

Amended petition filed June 5, 1911, and any exhibits filed therewith.

Amended answer filed November 25, 1911.

Demurrer filed November 25, 1911.

Opinion filed April 27, 1912.

Order of same day.

Reply filed January 25, 1913.

Amended answer filed February 27, 1913.

606 Rejoinder filed February 27, 1913.

Reply to second amended answer filed March 19, 1913.

Depositions of Walter B. Donnell, William Burg, James M. Buick, George P. Herman, H. M. Beer, James P. Sweeney, and any exhibits filed therewith, omitting certificate and caption of the case; also depos. of G. C. Maratta, Herbert S. Marshall, C. E. Walker.

Amended answer and counter-claim filed June 11, 1913.

Amended reply and answer to counter-claim filed June 11th, 1913.

Second amended reply and answer to counter-claim filed June 25, 1913.

Agreed stipulation filed June 25, 1913, at page 220 et seq of Record.

Agreement filed June 25, 1913, at page 222 et seq of Record, and any exhibits filed with either of said stipulations, omitting the certificates to Exhibit D filed with said stipulation at pages 243 and 244.

Opinion of Jefferson Circuit Court file- September 6, 1913.

- Judgment of September 24, 1913.
Opinion of Court of Appeals on appeal from the judgment of September 24, 1913, rendered May 29, 1914.
Mandate issued July 4, 1914, at page 267 of Record.
Statement of Commonwealth at page 286 et seq of Record.
Amended statement filed September 16, 1914, at page 271 et seq Record.
Amended statement filed in Jefferson Circuit Court September 16, 1914, at page 281 et seq. Record.
Answer Ewald Iron Company filed September 16, 1914, at page 284 et seq of Record.
Judgment Lyon County Court filed in Jefferson Circuit Court September 16, 1914, at page 278 et seq. of Record.
007 Judgment Lyon Circuit Court at page 292 et seq. of Record.
Answer of City of Louisville filed October 12, 1914.
Answer of Commonwealth filed October 28, 1914, at page 308 et seq of Record.
Amended statement filed October 28, 1914, at page 313 et seq Record.
Answer of City of Louisville filed November 2, 1914, at page 319 et seq. of Record.
Reply of Commonwealth filed — 2, 1914, at page 321 et seq. Record.
Amended answer to statement filed November 2, 1914, at page 328 et seq of Record.
Reply to amended answer filed November 16, 1914, at page 342 et seq. of Record.
Order controverting of record, at page 341 Record.
Reply of City of Louisville to amended answer filed December 16, 1914, at page 349 et seq. of Record.
Deposition of C. W. Cunningham taken January 30, 1915, at page 380 et seq. of Record.
Judgment of August 13, 1909, at page 391 et seq of Record.
Answer at page 393 et seq of Record.
Stipulation filed February 8, 1915, at page 394 et seq of Record.
Agreed statement at page 409 et seq of Record.
Articles of Incorporation of Ewald Iron Company at page 413 et seq of Record.
008 Judgment Lyon Circuit Court May 4, 1910, at page 415 et seq of Record.
Brief of appellant on motion of Blakey, Esq., 448 et seq of Record.
Opinion of November 22, 1910, at page 439 et seq of Record.
Petition for Extension of Opinion at page 448 et seq of Record.
Response of appellee at page 450 et seq of Record.
Response to petition for extension at page 453 et seq of Record.
Extended opinion at page 454 et seq of Record.
Opinion of Jefferson Circuit Court rendered May 8, 1915, at page 456 et seq of Record.
Judgment of Jefferson Circuit Court May 19, 1915, at page 468 et seq of Record.

Opinion of Court of Appeals filed January 25, 1916.
 Opinion of Court of Appeals of October 17, 1916.
 Opinion of Court of Appeals of November 28, 1916.
 Mandate of Court of Appeals issued December 27, 1916.
 Petition for writ of error.
 Assignment of errors.
 Allowance of writ of error.
 Writ of error.
 Citation and service.

609 Bond on writ of error.
 This stipulation.
 Certificate of the Clerk.

CHARLES H. GIBSON,
 WILLIAM W. CRAWFORD,
Attorneys for Plaintiff in Error.
 PENDLETON BECKLEY,
 GEO. CARY TABB,
 STUART CHEVALIER,
Attorneys for Defendant in Error.

[Endorsed:] 1917 January 4, filed. R. W. Keenon, C. C. A.

610 STATE OF KENTUCKY,
 Court of Appeals:

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the record called for in Præcipe, filed by the plaintiff in error, in the case of Fidelity & Columbia Trust Co., as Executor and Trustee of the estate of L. P. Ewald, deceased, appellant, now plaintiff in error, against the City of Louisville, Appellee, now defendant in error, for use of the plaintiff in error on an appeal to the Supreme Court of the United States from a judgment of the Court of Appeals of Kentucky.

In testimony whereof, witness my hand and seal of office, this January 24, 1917.

[Seal of Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

Fee \$189.30.

611 In the Supreme Court of the United States.

FIDELITY AND COLUMBIA TRUST COMPANY, as Executor and Trustee
under the Will of L. P. Ewald, Deceased, Plaintiff in Error,

vs.

CITY OF LOUISVILLE, Defendant in Error.

By agreement of the Plaintiff in Error, by counsel and the Defendant in Error by counsel, in printing the record in the above styled case the following pages of the record prepared by the Clerk of the Court of Appeals of Kentucky should be omitted as nothing contained on said pages are material to a proper consideration of the questions presented on this appeal.

Beginning with the statement on page 281 to the deposition on page 334 except the orders on page 288 and page 289.

Pages 487 to page 490 both inclusive.

CHARLES H. GIBSON,

WILLIAM W. CRAWFORD,

Counsel for Plaintiff in Error.

PENDLETON BECKLEY,

GEO. CARY TABB,

STUART CHEVALIER,

Counsel for Defendant in Error.

969/25,799.

612 [Endorsed:] File No. 25,799. Supreme Court U. S.
October term, 1916. Term No. 969. Fidelity & Columbia
Trust Company, Executor, etc., Plff in Error, vs. City of Louisville.
Stipulation to omit parts of record in printing. Filed March 1,
1917.

Endorsed on cover: File No. 25,799. Kentucky Court of Ap-
peals. Term No. 969. Fidelity & Columbia Trust Company, as
Executor and Trustee of the estate of L. P. Ewald, plaintiff in error,
vs. City of Louisville. Filed March 2d, 1917. File No. 25,799.



18
Office Supreme Court, U. S.

FILED

MAY 19 1917

JAMES D. MAHER.

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 969.

FIDELITY & COLUMBIA TRUST COM-
PANY, AS EXECUTOR AND TRUS-
TEE OF THE ESTATE OF L. P.
EWALD, DECEASED, - - Plaintiff in Error,

v.

CITY OF LOUISVILLE, - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

MOTION TO ADVANCE.

PENDLETON BECKLEY,
GEO. CARY TABB,
STUART CHEVALIER,

*Counsel for City of Louisville,
Defendant in Error.*



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 969.

FIDELITY & COLUMBIA TRUST COMPANY,
AS EXECUTOR AND TRUSTEE OF THE
ESTATE OF L. P. EWALD, DECEASED,
Plaintiff in Error,
v.

CITY OF LOUISVILLE, - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF
THE STATE OF KENTUCKY.

MOTION.

The defendant in error, appearing by Pendleton Beckley, Geo. Cary Tabb and Stuart Chevalier, moves the court to advance this cause for a hearing on a day convenient to the court as early as possible in the October Term, 1917.

This action was originally brought by the defendant in error to recover taxes due it from the plaintiff in error. A judgment was decreed the defendant in error and same was affirmed by the Court of

Appeals of Kentucky. This judgment, with interest and penalties calculated as of December 30, 1916, aggregates the sum of ninety-six thousand nine hundred and five dollars and twenty-eight cents (\$96,905.28). It is deemed important that this case be decided as soon as possible because the defendant in error is being deprived of the use of this large amount of money in the maintenance of its government, and in planning the fiscal affairs of the City it is important that the defendant in error know certainly whether or not it can calculate upon the use of this sum.

Counsel for plaintiff in error join in this motion.

PENDLETON BECKLEY,
GEO. CARY TABB,
STUART CHEVALIER,
Counsel for City of Louisville,
Defendant in Error.

19

Office Supreme Court, U. S.

FILED

OCT 5 1917

JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 424.

FIDELITY & COLUMBIA TRUST COMPANY, AS EXECU-
TOR AND TRUSTEE OF THE ESTATE OF
L. P. EWALD, PLAINTIFF IN ERROR,

VERSUS

CITY OF LOUISVILLE, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM W. CRAWFORD,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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ESTATE OF L. P. EWALD, - - - *Plaintiff in Error,*

versus

CITY OF LOUISVILLE, - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

This case involves the right of the City of Louisville to tax \$1,500,000 as of September 1, 1906, and \$1,850,000 as of September 1, 1907, in bank in the city of St. Louis, Mo., which plaintiff in error claims had a situs in Missouri, and not in Kentucky.

Under the facts hereafter shown, plaintiff in error claims that the judgment of the Court of Appeals of Kentucky violates the Fourteenth Amendment of the Federal Constitution in that,

- 1st. It deprives it of its property without due process of law; and
- 2d. In that it denies it equal protection of the law.

STATEMENT OF THE CASE.

For many years prior to 1880, L. P. Ewald was a resident of St. Louis, Mo., but later became a resident of Louisville, Ky.

Prior to 1880, with various associates, he was engaged in St. Louis in the business of buying and selling iron. In that year he bought the land and mills of the Tennessee Rolling Mills in Lyon County, Kentucky, organized a corporation under the laws of Kentucky, and designated Lyon County as the chief place of business of the company. The corporation was known as the Ewald Iron Company, and the St. Louis office and warehouse were continued as before the incorporation.

Because of inadequacy of transportation facilities, the company bought an old mill in Louisville, Ky., about 1886, and thereafter abandoned use of the mill in Lyon County, the business otherwise continuing as before.

The iron manufactured in Kentucky was either shipped to a customer direct, or shipped to St. Louis, from which point it was distributed. Some iron not made by the company was purchased by the St. Louis office, which was in charge of the Secretary and Assistant Treasurer (*both residents of St. Louis*) and paid for by that office.

At the mills in Louisville, a set of books was kept, and at St. Louis, another set of books was kept, and the output of the mills was billed to the St. Louis selling agency at a mill profit and sold by the St. Louis agency at an advanced price.

The Louisville books did not show the St. Louis profits, and the St. Louis books did not show the mill profits.

The selling of the product was largely done by the St. Louis office, and all money received by that office deposited in St. Louis banks.

Money received from customers by direct sales from the mill office or sent to the mill office was deposited in the Bank of Kentucky in Louisville.

On September 1, 1906, and September 1, 1907, the company had on deposit in St. Louis banks, \$1,629,836.36 and \$1,837,404.48 respectively. This was either in form of open account or represented by certificates of deposit kept in an office safe in the St. Louis office by the Assistant Treasurer there.

(The above facts having been found by the trial court and not reviewed by the Appellate Court, we assume will be treated as established. See Record, pp. 174-5.)

All of this money represented business done in St. Louis by the St. Louis office, and not one dollar of the money or the evidences showing ownership of the money were ever in Kentucky.

The Ewald Iron Company was incorporated for a period of twenty-five years, and, therefore, automatically expired in November, 1905. Prior to that time, L. P. Ewald became the sole owner of the company by stock purchase.

In a case involving the taxation of the same money in bank involved here for the year 1910 brought by Lyon County, Kentucky, the Court of Appeals held that as the corporation had two years in which to wind up its busi-

ness under the Kentucky Statutes, the Ewald Iron Company, although **owned by one man**, did not expire until November, 1907 (*see opinion of Chancellor, Record, p. 137, and extended opinion of Court of Appeals of Kentucky in Ewald Iron Co. v. Commonwealth, 142 Ky. 465.*)

On the second appeal of this case, in an opinion by a divided court, several of the judges held that this ruling did not apply to the Ewald Iron Company, although rendered on an appeal by it in a former case.

The Ewald Iron Company paid taxes to the City of Louisville and the State of Kentucky on its manufacturing plant and other tangible property located in Kentucky (*see opinion of Court of Appeals, Record, p. 262*), but did not pay taxes on the St. Louis deposits.

After Ewald's death, the City of Louisville retrospectively assessed his estate for taxes for the years 1904, 1905, 1906, 1907 and 1908, and brought suit against his executor to enforce the assessment. The Jefferson Circuit Court sustained the assessment.

At the same time, Lyon County was attempting to assess the same money for the same years, and the Lyon Circuit Court sustained the assessment.

Upon appeal, both judgments were reversed **without opinion on the merits** of either case (*Record, p. 140*), the cases being sent back to be consolidated in the Jefferson Circuit Court and tried anew. That opinion conceded that the Federal questions were raised but failed to decide them.

After consolidation of the cases the Jefferson Circuit Court rendered a new opinion holding the executor

liable, but recognizing that the Federal question had been properly raised by pleading and argument in the following language (*Record*, pp. 175 and 176):

“Upon this hearing counsel for the defendant is again urging with skill and force the same reasons which he urged in this court upon the former trial and also in the Court of Appeals.

“They appear in the brief as follows:

“(1) That L. P. Ewald could not be individually taxed for the Ewald Iron Company’s money in St. Louis in any event prior to November 5, 1907.

“(2) That the Ewald Iron Company money in St. Louis banks arose out of business done in Missouri and was permanently on deposit there; hence had no situs for taxation in this State.”

Again:

“2. The second contention raises the most serious question. If the taxable situs of the money earned by the corporation was in St. Louis, Mo., then of course it was taxable in Missouri, and not subject to taxation in Kentucky at all, in either Lyon County or in the City of Louisville. By apt pleading the Federal question is presented, and numerous decisions of the Court of Appeals of this State and of the Supreme Court of the United States are cited and relied upon in argument. The question is not free from difficulty by any means, and should be decided for the defendant if certain language of the Court of Appeals and of the Supreme Court is to be taken literally and without qualification.

“In the case of Hillman Land & Iron Company, 148 Ky. 331, the court quoted with approval the New York Court in *In re Houdyer*, 150 N. Y. 37, where a non-resident who afterwards dies had deposited funds in a New York bank and the question of succes-

sion taxes upon the money arose. Under the circumstances of that case the court held the funds had a situs in New York. Silencing the contention that the credit in the bank to the depositor was so intangible as to follow the person the court said:

“ ‘While the relation of debtor and creditor technically exist, practically he had his money in bank and could come and get it when he wanted it. It was an investment in this State, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this State. The depository was a resident corporation, and the receiving and retaining of the money were corporate acts in this State. * * * Conceding that it was intangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act.’

“After the above question the Court of Appeals goes on to say in the Hillman case (*supra*):

“ ‘In the Dun case, in the Bluefield Banana Co. case, in the Houdyer case, in Blackstone v. Miller, 188 U. S. 189; New Orleans v. Stempel, 175 U. S. 309; Buck v. Beach, 206 U. S. 392; Metropolitan Ins. Co. v. City of New Orleans, 205 U. S. 395; State Assessors v. Comptoir Natl. D., etc., 191 U. S. 388; Liverpool & London Ins. Co. v. Board of Assessors, 221 U. S. 346; Commonwealth v. Peebles, 134 Ky. 121; Commonwealth v. West India Oil Ref. Co., 138 Ky. 828, and in many other cases decided by this and other courts, it has been firmly settled that money or intangible property of a non-resident is subject to taxation in the State in which it has an actual situs for business purposes, as when it is in the custody of an agent or fiduciary within the State who manages and controls it by lending it out investing it, collecting the interest, and the like, or when it is the accumulation or income from the business done in the State or when it has been placed permanently on deposit.’

"The attention of this court has been called to many other cases and particularly to Commonwealth v. R. G. Dun & Co., 126 Ky. 108; Higgins v. Commonwealth, 126 Ky. 211; and the very recent cases of Commonwealth v. B. F. Avery & Sons, 163 Ky. 828, and Wheeler v. New York, 233 U. S. 434.

"The Wheeler case is very similar to the Houdyer case, except that in the former the property consisted of notes, which the decedent had placed in a safety box in a New York bank. The striking feature of the opinion is the firmness of the court in its position as disclosed by the suggestion that if the former case of Buck v. Beach should be construed as in conflict with the principle of the Wheeler case, it should no longer be considered authority.

"The Avery case (163 Ky. 828) has at first blush much in common with the case at bar, but when the two cases are viewed together a distinction is to be made."

Following this, he holds that by not dismissing both appeals referred to just above, the Court of Appeals in effect decided the question adversely to plaintiff in error and bound him to follow that judgment in this language (*Record*, p. 179):

"If the money on deposit in St. Louis had acquired a situs there, then the ruling in Ewald Iron Company against Commonwealth above mentioned is no longer authority in this State. **This court is required to hold that inasmuch as this question was presented to the Court of Appeals, when this case was before it, and the court could have ordered a dismissal of these actions if it had deemed the location of the property to be in St. Louis, that the question is not open.** Ewald, etc., v. Commonwealth, 159 Ky. 323."

Upon appeal from that judgment, it was at first affirmed by divided court (*see Record, p. 261*) but later, upon petition for rehearing, the court directed a mandate affirming as to taxes for 1907 and 1908 only, and reversing as to taxes for 1904, 1905 and 1906.

The question of "situs" of the bank deposits was decided by the Court of Appeals of Kentucky against plaintiff in error without discussion, and no decision of theirs sustaining its contention **reversed** or **modified**.

The decision here stands

"isolated from the established law of Kentucky"

and this court is asked to reverse same upon the ground that the decision in this case violates the Fourteenth Amendment in that it takes plaintiff in error's property,

- (1) Without due process of law; and
- (2) Denies it equal protection of the law.

ARGUMENT.

Taxing Property that the Owner Has Given a Situs Separate from His Domicile, by the Government of His Domicile, Takes His Property Without Due Process of Law.

In the case of **Louisville & Jeffersonville Ferry Co. v. Kentucky**, 188 U. S. 385, where Kentucky included in its taxation of a Kentucky corporation the value of an Indiana franchise, this court held that to tax intangible property (*such as an incorporeal hereditament having no situs in Kentucky*), was a taking of the property of the company without due process of law; Justice Harlan, for the court saying:

“The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by the State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.” (P. 398.)

In **Union Transit Co. v. Kentucky**, 199 U. S. 194, the court said (p. 204):

“It is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State receives none of the protection for which the tax is supposed to be the compensation.”

Again, in the same case, the court quotes with approval the doctrine of the earlier case of **Foreign-held Bonds**, 15 Wall. 300, that,

"No adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised." (*P. 204.*)

The above rule as shown by the decisions is equally applicable to tangible and intangible property. There is sometimes difficulty in showing the **situs** of **intangible** property, but when it can be shown to have acquired a **situs**, there is no difficulty as to the application of the rule.

Section 4020, Kentucky Statutes, is the basis upon which property is taxed by the State or its subdivisions.

That section as in force September 1, 1906, and September 1, 1907, reads as follows:

"2. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the same be in or out of the State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale: Provided, however, That tangible personal property located and having a taxable situs without the State of persons residing in this State, and of all corporations organized under the laws of this State, shall not be subject to taxation." (*See Acts 1906, pages 88-9.*)

At first blush this statute would seem to militate against the position taken by plaintiff in error. We have just seen, however, by the decision in the Louisville & Jeffersonville Ferry Co. case, *supra*, that so much of this statute as authorizes a tax upon **intangible property** which has acquired a situs elsewhere than in Kentucky, although belonging to a resident, is unconstitutional and void.

The Court of Appeals of Kentucky has uniformly and consistently recognized this, and although asked to overrule this interpretation of Section 4020 after the first decision in this case, the court after mature and deliberate consideration, refused to do so, as we shall presently show.

The right to tax property, whether tangible or intangible, not immediately located at the residence of the owner, grows out of the old legal fiction of *mobilia personam sequuntur*. Speaking of that doctrine, this court, in **Adams Express Co. v. Ohio**, 166 U. S. 185, 223, said:

“It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was ‘*mobilia personam sequuntur*,’ but that maxim was never of universal application and seldom interfered with the right of taxation.”

Following this, the court held that “franchise value” had actual **situs** for taxation wherever the company did business to the **extent of the business done there**, thus **fixing** the right of some States, and **excluding** the power of others to tax that **intangible** asset of the company.

Practically every State has insisted upon its right to tax bank deposits growing out of business done within its borders or permanently located within its borders on the theory of **local situs**, and few States have oftener announced this doctrine than Kentucky.

Referring to **money in bank** in Louisville belonging to R. G. Dun & Co., a non-resident partnership doing business in Kentucky and construing Section 4020, the Court of Appeals said (*126 Ky. 111*):

“There can be no doubt that this **money in bank**, and debts due appellee, referred to, were personal estate. Section 4020 of the Kentucky Statutes of 1903 declares ‘all real and personal property situated within this State * * * shall be subject to taxation unless the same be exempt from taxation by the Constitution. * * *’ This section of the statute literally construed, includes all property, whether owned by residents or non-residents. This court, however, in construing this statute, has determined that it does not apply to the property of non-residents when in this State **temporarily**; that in such a case the situs for taxation is at the domicile of the owner.” (*Citing cases.*)

Again:

“But this court has never held that when a non-resident establishes a business in this State, from which money is derived, and other property is **accumulated**, such property should be relieved from taxation. In our opinion the **accumulations** from the business of appellee are **not temporarily** in this State in the meaning of the decisions referred to.” (*Citing Bristol v. Washington Co., 177 U. S. 144, and New Orleans v. Stempel, 175 U. S. 309.*)

This case has been cited and approved and considered as the established law of Kentucky in at least six different opinions by the Court of Appeals, and its doctrine never criticized or modified.

In **Commonwealth v. Peebles**, 134 Ky. 121, 134, the court said:

“It has also been ruled in many cases, both in and out of this State that when money, choses in action, or other intangible personal property is in the actual custody of an agent or fiduciary within this State, who manages and controls it, by lending it out, investing it, collecting interest, and the like, that it is subject to taxation at the place, where the agent or fiduciary resides, although the beneficial owners may be non-residents of the State.”

Next came the case of **Commonwealth v. West India Oil Refining Co.**, 138 Ky. 828, which is so similar to the case at bar as to justify more extensive reference.

The West India Oil Refining Company is a Kentucky corporation doing business in Cuba and Porto Rico. A revenue agent for Kentucky sought to assess in Kentucky choses in action and money in bank in Cuba and Porto Rico belonging to the company. The same trial court that passed on the case at bar, in the West India Oil case held that

“neither the cash, nor the deposit in bank there, nor the accounts had a taxable situs in the State of Kentucky.”

In affirming this judgment, the Court of Appeals, in part, said:

"The appellee is a corporation organized under the laws of this State, its legal residence is in this State, and, therefore, if the statute (*Sec. 4020*) is constitutional, the property is taxable here."

The court then reviews its own decisions and the decisions of this court holding the statute unconstitutional, and adds:

"The question in this case is not therefore whether the property in question has been taxed in Cuba or Porto Rico. The question is simply, Is it taxable here? If it has not been taxed there, it may still be taxed perhaps. If not, that fact will not confer jurisdiction to tax it here. In *People v. Barker*, 155 N. Y. 665, 49 N. E. 1103, and *Id.*, 23 App. Div. 524, 48 N. Y. Supp. 555, the Court of Appeals of New York reached the same conclusion as was announced by this court in the *Dun* case on practically similar facts. Other similar decisions are referred to in the cases cited. The business of the corporation was carried on entirely outside of Kentucky. Its property, though intangible, had no situs in Kentucky. It was never here. It was taxable where the business was carried on. If it could be taxed there and elsewhere, it would be twice taxed. It can not be taxed here unless within the jurisdiction of the State under the repeated decisions of the United States Supreme Court. No practical distinction can be drawn between the money of the company in its office in Cuba or that deposited in a bank there, or that due on its books for its product which has been sold and not paid for. It is all employed in the business in Cuba or Porto Rico. It has its situs there. It has no situs in Kentucky."

This case was followed by **Commonwealth v. Kentucky Distilleries & Warehouse Co.**, 143 Ky. 314, where

a New Jersey corporation doing business in Kentucky was held liable for taxation on storage accounts accruing in Kentucky where the company did business. That case is the converse of the case at bar, and the language of the court is particularly pertinent. Speaking of the Louisville office, the court says:

"It is at this office that all the business relating to and concerning the distilleries operated by it is carried on, and there is kept all of the books, accounts and papers of the corporation that relate to the transaction of its business in this State. It may, therefore, be said that while the Kentucky Distilleries & Warehouse Company has a technical legal residence in the State of New Jersey, it has in this State a business residence at which all its business in this State is managed and carried on by resident agents and employes. It is here that the warehouse receipts are issued, and here that they are presented when the possession of the whiskey described in them is demanded, and here that the storage accounts are paid, although in the meantime and before they are actually transferred to the purchaser they may pass through an office of the company in New Jersey or New York. It is here that the whiskey is located upon which these receipts are a lien, and to which the company looks for the payment of its storage fees. In short, aside from the fact that it has a mere technical legal residence in the State of New Jersey, all of its business is conducted and carried on in this State, and for every business purpose it is a Kentucky corporation."

In the instant case, the sales were made in St. Louis, the money received in St. Louis, deposited by St. Louis agents of the owner in St. Louis, the evidences of those deposits kept in St. Louis, the deposits increased by in-

terest paid on them in St. Louis, and not even a record kept in Kentucky covering the transaction in any way.

The case of **Hillman Land & Lumber Co. v. Commonwealth**, 148 Ky. 331, again brought Section 4020 before the court, and an elaborate opinion was written showing what facts gave a **situs** to bank deposits, under this section, and thus placed them within or **without** the taxing power of the State irrespective of the domicile of the owner.

After citing many cases, the court says (*p. 342*):

“* * * * And in many other cases decided by this and other courts, it has been firmly settled that **money or intangible** property of a non-resident is subject to taxation in the State in which it has an actual situs for business purposes, as when it is in the custody of an agent or fiduciary within the State who manages and controls it by lending it out, investing it, collecting the interest, and the like, **OR when it is the accumulation OR** income from the business done in the State **OR** when it has been placed **permanently on deposit.**”

Again, a reference to the facts in the case at bar. Both the lower and upper courts found that the money sought to be taxed here was,

- (1) Accumulation or income from business done in Missouri;
- (2) Placed permanently on deposit in St. Louis;

and while there was no finding either way, the uncontradicted evidence clearly shows the money was deposited in the bank by a resident agent of St. Louis who attended

to securing the certificates of deposit and kept those certificates permanently in St. Louis.

In the later case of **Commonwealth v. Prudential Life Insurance Co.**, 149 Ky. 385, the court again referring to bank deposits, says (*p. 385*):

“If the money sought to be taxed had been sent to this State to remain here on deposit, or was on deposit for permanent purposes, or if it was the accumulation or income derived from the business done in this State, or if it was sent here for the purpose of being invested, there would be no difficulty in holding that it was subject to taxation.”

This language is at singular variance with the effect of the decision here. It will be noted that the court has consistently held that money permanently on deposit in bank here sent here for that purpose is given a local situs, and that the fiction of *mobilia personam sequuntur* does not apply. If it has a situs here, it, of course, has none at the residence of the owner, and the converse is equally true. So money permanently on deposit in St. Louis by a parity of reasoning, has its situs in St. Louis and not in Kentucky, as decided by Judge Hobson in the West India Oil case.

The next decision was in this case, where the lower court was reversed without opinion, but which reversal was treated by the trial court as binding on him as a decision of the question now under discussion (*Record, p. 179, and 159 Ky. 332, Record, p. 136, decided September 6, 1913*).

It must be borne in mind, however, that in this decision **no previous decision was set aside, overruled, modified, explained or differentiated** from the ruling made here.

Eighteen months after the first decision here, the case of **Commonwealth v. B. F. Avery & Sons** was decided, and again the doctrine of the Dun case reaffirmed, and the West India Oil decision expressly approved, although the court announces it was asked to overrule that decision.

Avery & Sons is a Kentucky corporation having branches or selling agencies in Atlanta, Memphis, New Orleans, and other places.

“At each of these branches, the corporation conducts its business for the particular territory tributary thereto, keeping distinct records of its accounts receivable in such territory, and depositing in local banks the sums of money realized from sales therein.” (*See opinion, 163 Ky. 829.*)

A revenue agent for Kentucky sought to assess these accounts and deposits.

In holding they had acquired a situs outside the State, and were not taxable here, the court said:

“It is no longer open to dispute that tangible personal property actually present in another State so as to acquire there a situs for taxation, is immune from taxation at the domicile of the owner. *D., L. & W. v. Pennsylvania*, 198 U. S. 341; *Union Ref. Co. v. Kentucky*, 199 Ky. 194, 4 Ann. Cas. 493.

“And this rule has also been extended to accounts receivable. *Commonwealth v. West India Oil Re-*

fining Co., 138 Ky. 828, 129 S. W. 301. In the last named case, however, the corporation employed its **whole capital outside of this State**; but we are unable to see any practical distinction between such state of fact, and that existing in the present case, where the corporation **employs only part** of its capital in other States. As to that part so employed, there is immunity from taxation in this State."

After reviewing cases, the court said:

"There can be no doubt, therefore, that the accounts receivable of the B. F. Avery & Sons' branch selling agencies have a taxable situs in the States wherein those branches are located; and are therefore immune from taxation in this State, the domicile of the owner, under the rule announced in the West India Oil Refining Co. case, *supra*.

"We are urged by appellant to overrule that case, but are not inclined to do so."

How this case can possibly be distinguished from the case at bar we are unable to see.

Avery & Sons, a resident of Kentucky, as was Ewald or the Iron Company, each maintained a selling agency elsewhere, each deposited money in bank derived from these sales elsewhere, each sum so deposited was deposited by a non-resident agent, each maintained separate books and the money sought to be taxed was carried on the books of the foreign agent, and while each deposit was, of course, subject to the order of the home office or the resident of Kentucky, the deposit was actually kept outside of Kentucky, and the evidences thereof permanently located elsewhere. Yet in the one case, the

property is held to not have a situs in Kentucky, and in the other, to have a situs there.

When the lower court came to consider these cases after the first reversal, he frankly conceded that,

“The question is not free from difficulty by any means and should be decided for the defendant (*plaintiff in error*) if certain language of the Court of Appeals and of the Supreme Court is to be taken literally and without qualification.” (*Record*, p. 176.)

With the exception of the judgment in this case, the decisions of the Court of Appeals of Kentucky present an unbroken chain of reasoning to the effect that money in bank growing out of business done in a particular State or permanently deposited in bank in a particular State **has acquired a situs** and that **situs** is in no way controlled by the domicile of the owner.

This court has frequently had occasion to consider the question of whether intangible property could acquire a situs distinct from the domicile of the owner.

The question came before this Court and was elaborately considered in response to a petition for rehearing in **Adams Express Co. v. Ohio**, 166 U. S. 218, 223, where the court said:

“Now the taxes imposed upon express companies by the statutes of the three States of Ohio, Indiana and Kentucky are certainly not in terms ‘privilege taxes.’ They purport to be upon the **property** of the company.”

Again:

"And the only really substantial question is whether properly understood and administered, they subject to the taxing power of the State **property not within its territorial limits.**"

Meeting that question with reference to franchise value, Mr. Justice Brewer for the court said:

"But **where** is the **situs** of this intangible property? The Adams Express Company has, according to its showing in round numbers, \$4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered, transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contract, franchises and privileges which it has acquired and possesses, it has created a corporate property of the value of \$16,000,000. Thus, according to its figures, this **intangible** property, its **franchises**, privileges, etc., is of the value of \$12,000,000 and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply **where** its **home office** is, where is found the **central directing thought** which controls the working of the great machine, or in the State which gave it its corporate franchise, or is that intangible property distributed **wherever its tangible property is located and its work is done?**

"Clearly, as we think, the latter."

The court further shows that the doctrine of "*mobilia personam sequuntur*" would presume the taxable situs in New York, but that—

“That maxim was never of universal application and seldom allowed to interfere with the right of taxation.”

The converse of this right of Kentucky to tax that part of a non-resident franchise exercised in Kentucky, is shown by the denial of the right to Kentucky to tax Kentucky corporations on that part of their franchises or “intangible personalty” which actually acquires a “situs” elsewhere.

In the case of **Louisville & Jeffersonville Ferry Co. v. Kentucky**, 188 U. S. 397, where, included in the company’s property assessed was the value of the ferry franchise or license granted by Indiana, this court, in denying Kentucky’s right to assess, said:

“There is in our judgment no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an **incorporeal hereditament**, which has its **situs** in Indiana. While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the Legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government.”
Page 396.

In the case of **Union Transit Co. v. Kentucky**, 199 U. S. 202, this ruling was approved and the court further said:

“The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to

the taxpayer in the protection of his person and property in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children.

"If the taxing power be in no position to render these services or otherwise benefit the person or property taxed and such property be wholly within the taxing power of another State to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the Legislature and a taking of property without due process of law." (*Citing many cases.*)

In line with this was the declaration in **Delaware, etc., R. R. Co. v. Pennsylvania**, 198 U. S. 357, to the following effect:

"So if a State can not tax tangible property permanently outside the State and having no situs within the State, it can not attain the same ends by taking the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State."

To the same effect is the case of **Selliger v. Kentucky**, 213 U. S. 205, where the right of Kentucky to tax warehouse receipts representing whiskey of a Kentucky resident stored in Germany was denied.

Defendant in error contends, however, that a bank deposit can not acquire a situs, and cites a number of cases from State courts as sustaining this view. What-

ever may have been the earlier view on this question (*and we concede cases can be found in other jurisdictions sustaining defendant in error's view*) this court has consistently held in every late opinion, that "money on deposit in bank" can acquire a situs for taxation just the same as tangible personal property.

One of the leading cases on this point is **New Orleans v. Stempel**, 175 U. S. 313, where the question was squarely before the court for decision. The court said:

"The question, therefore, is distinctly presented whether, because the **owners** of the money were **domiciled** in the **State of New York**, the moneys so **deposited in bank within the limits of Louisiana** and the notes secured by mortgages situated and held as above described, were free from taxation in the latter State."

The facts there were that the money and credits sought to be taxed were in Louisiana and the owners of the property residents of New York. The mingling of the depositor's money with the money of the bank did not affect the right to tax.

"It is true (*says the court at page 316*) that when deposited, the money became the property of the bank, and for most purposes the relation of debtor and creditor arose between the bank and the depositor; yet, as evidently the moneys were to be kept in the State for reinvestment or other use, they remained subject to taxation, according to the decision in 49 La. Ann. 43."

In **Metropolitan Life Ins. Co. v. New Orleans**, 205 U. S. 395, the right of New Orleans to tax—

“credits, money loaned, bills receivable, etc.,”

belonging to a non-resident corporation arose. The contention was that such intangible property had no situs in Louisiana and was, therefore, not taxable in New Orleans.

The insurance company had an agency in New Orleans where policies of insurance were secured from residents of Louisiana and elsewhere. Policyholders desiring to obtain loans on their policies applied to the company's agent at New Orleans. If the agent thought the loan a desirable one, he advised the company of the application by **communicating** with the home office in New York.

If the home office approved the loan, the company **forwarded to the agent** a check for the amount with a note to be signed by the borrower. The agent procured the **note** and **sent it to New York**. Interest on the note and the note itself was paid at New Orleans. After referring to the Bristol case, 177 U. S. 133, with approval, Mr. Justice Moody said:

“Here the loans were negotiated, the notes signed, security taken, the interest collected, and the debts paid within the State. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long-continued, though not permanent absence, can not have the effect of releasing them as representatives of investments in business in the State from its taxing power.”

Defendant in error insists, however, and the Court of Appeals seemed to attach some importance to the fact, that because the money could not be withdrawn from the

St. Louis banks except upon check signed or countersigned by L. P. Ewald, the rule of the above cases could not be invoked.

This seems to proceed upon the theory that if the power to destroy the business or permanency of the asset within a given State resides elsewhere, there can be no situs apart from the locality where such power resides. This theory negatives the principle upon which every one of the above decisions proceeded. Were it not so, the doctrine of *mobilia personam sequuntur* must prevail in all cases, because the final owner of the credit, money, or deposit, can, in all cases, change the locality of the "thing" involved, whether he acts directly or indirectly.

There could be no possible logic in saying that A could tell his agent in a foreign State what to do, and still have the "thing" involved have a situs there, and yet by merely removing the agent and doing it in person, destroy the situs there.

Upon an examination of the Metropolitan case above referred to, we find the analogy in this regard between that case and the instant case is complete on that question except the facts are strange for plaintiff in error herein that in the case at bar the securities were permanently kept outside of Kentucky and in Missouri, and were never separated from the place where the bank deposit was.

The Metropolitan agent could not make a loan **without approval first received from the New York office.** He not draw the money from the Louisiana bank, but it was

sent to him from the New York office. The notes given for the loan were not kept in Louisiana, but in New York under the domination of the New York officials, and when any one was paid, the money was immediately transmitted to the New York office.

Thus the "central directing thought," the "vital control," the "power to destroy" which seems to be dominant in the mind of the defendant in error was not located in Louisiana, where this court held the **situs of the credit** was.

In the Bristol case, the same thought was present when the credit belonging to the individual debtor was held to have acquired a situs different from his domicile, in the following language:

"The **creditor**, however, may **give it a business situs elsewhere** as where he places it in the hands of an agent for collection or renewal with a view to reloaning the money, and keeping it invested as a permanent business."

It could not be questioned that in the Bristol case, the real owner at any time could remove the credit from Washington County upon his mere direction to that effect.

In **Wheeler v. New York**, 233 U. S. 434, the situs of evidences of debt for the purpose of taxation was again considered.

One Tiffany, not a resident of New York, left in a safe deposit box in New York four promissory notes made by a resident of Chicago. The appraisers held the notes subject to tax.

In sustaining the tax, Mr. Justice Holmes said:

“As to authority, it has been asserted or implied again and again that the States had the power to deal with negotiable paper on the footing of **situs**. ‘It is well settled that bank bills and municipal bonds are in such concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner. Notes and mortgages are of the same nature, and we see no reason why a State may not declare that if found within its limits they shall be subject to taxation.’ (*Citing cases.*)

“This is the established law, unless it has been overthrown by the decision in *Buck v. Beach*, 206 U. S. 392. **No such effect should be attributed to that case.**” (*Black type ours.*)

The court then shows that it was never intended in the 206 U. S., opinion to more than hold that a temporary presence in Indiana on assessment day in Ohio was not sufficient to avoid Ohio taxation where they were located at all other times.

Continuing, the court said:

“If *Buck v. Beach* is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred.”

The above reference to *Buck v. Beach* is made necessary because of the importance attached to that case in argument by defendant in error below. Upon examination it will be found not to be in point in either law or fact and were it otherwise, the analysis given it by the

court in the Wheeler case renders it useless as authority here.

From the above review of the cases both of the Court of Appeals of Kentucky and of this court, it seems apparent that Section 4020 of the Kentucky Statutes can not reach property which has acquired a situs outside of the State of Kentucky. Where intangible, it can, of necessity, only acquire a foreign situs by the action of the owner of the property. That such may be done, the explicit language of this court in the Bristol case (*approved by the Court of Appeals of Kentucky in the West India Oil case*) expressly shows:

“A credit, which can not be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned—at the domicile of the creditor. **The creditor, however, may give it a business situs elsewhere,** as when he places it in the hands of an agent for collection or renewal with a view to reloaning the money and keeping it invested as a permanent business.” 177 U. S. 141.

Here the Ewald Iron Company or Ewald personally, it is immaterial which, gave a certain portion of its or his property a business situs in Missouri by conducting a business there, employing resident agents there, selling iron, no matter where manufactured, receiving the money for the sales there, depositing this money in bank there, and indicating the intention to keep it permanently there by transferring it from open accounts to certificates of deposit, which evidences of debt were permanently kept there.

It is difficult to imagine anything further the owner of this money could have done to

“give his property a Missouri situs”

and thus bring himself within the rule of the above cases. If we accept the decisions of the Court of Appeals, to instance, the Prudential case, *supra*, any one of the things done would have been sufficient to remove the “situs” from Kentucky liability to taxation. For,

- (1) “If it were sent there to remain on permanent deposit”;
- or (2) “If it were on deposit for permanent purposes”;
- or (3) “If it were the accumulation of business done there”;
- or (4) “If it were sent there for the purpose of being invested”;

“there would be no difficulty” says the court, “in holding it was subject to taxation” there. 149 Ky., at page 385.

We submit that the taxation of this money in Kentucky deprives plaintiff in error of its property without due process of law.

II.

The Judgment Denies Plaintiff in Error Equal Protection of the Law.

The Fourteenth Amendment to the Federal Constitution provides that no State shall

“deny to any person within its jurisdiction the equal protection of the laws.”

This provision was obviously inserted in the Constitution to guarantee rights which might not fall within one of the preceding or subsequent limitations. It was intended to make the application of law fall alike upon all within a given class where the circumstances surrounding the application were similar. It was intended to prevent any discrimination by Government against persons within its jurisdiction. Because it is general in terms, its prohibitory force is not to be denied simply because no showing can be made that a preceding clause has been violated by the particular governmental act complained of. To instance, it is not necessary for us to show that the property of plaintiff in error is taken without “due process” in order to sustain the proposition that plaintiff in error has not been afforded equal protection of the law, if, as a matter of fact, the application of the law has had that effect. That this prohibition was intended to have an essentially practical effect has been clearly recognized by the opinions of this court to the effect that the prohibition applies to all agencies of government.

In **Yick Wo v. Hopkins**, 118 U. S. 356, an ordinance of San Francisco was claimed to deny to Yick Wo equal protection of the law, and, theretofore, to be void under the Fourteenth Amendment.

Mr. Justice Matthews, stating the contention, said:

“It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances is made possible by them.”

Again:

“In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Consti-

tution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; and *Soon Hing v. Crowley*, 113 U. S. 703."

In *Ex parte Virginia*, 100 U. S. 339, 346, 347, in considering the application of the provisions of the Fourteenth Amendment, the court said:

"We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No **State** shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by **whatever instruments** or in **whatever modes that action may be taken**. A State acts by its **legislative**, its **executive**, or its **judicial** authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the

State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

That the prohibition against the State denying the equal protection of the law to the individual within its borders applies alike to the legislative, executive and judicial authorities, was again announced by the Court in **Blake v. McClung**, 172 U. S. 239, 260.

Applying the above interpretation of the prohibition of the "equal protection" clause of the Fourteenth Amendment to the instant case, it is wholly immaterial what rights or power are conferred upon Kentucky by the enactment of Section 4020, Kentucky Statutes if, in the practical application of that statute by the courts of last resort, there is in fact discrimination between persons similarly situated.

For the purpose of the immediate discussion and not considering the "due process" clause at all, we do not wish to be understood as denying to the Court of Appeals of Kentucky the right to **overrule its own decisions**, nor from interpreting Section 4020 in such a way as to properly classify persons or things coming within its purview. What we do claim is that in applying Section 4020, the Court of Appeals can not hold that the property of the West India Oil Company or the property of B. F. Avery & Sons under a given set of circumstances, has acquired a situs outside of Kentucky, and is not liable for taxation, and at the same time hold that the property of L. P. Ewald or the Ewald Iron Company held by him or it

under like circumstances, has not acquired a situs outside of Kentucky, and is, therefore, taxable in Kentucky.

If this be not true, the section has no meaning whatever, and is absolutely useless for practical application. Yet in the Yick Wo case, *supra*, it is said that this clause was—

“undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions.” 118 U. S. at page 367.

It seems to us demonstrable from the facts of this case and the opinions of the Court of Appeals of Kentucky that the decision here denied plaintiff in error the equality of application of Section 4020 contemplated by Justice Matthews in the above decision.

Let us see.

In the West India Oil case, 138 Ky. 828, decided June 17, 1910, before the first appeal of this case, the court, in construing Section 4020, Kentucky Statutes, held that where a domestic corporation did its business outside of Kentucky, its intangible property, such as **bank deposits**, had no situs here for taxation, and that any attempt to tax such deposits here would be unconstitutional and void, saying (*p. 834*):

“The business of the corporation was carried on entirely outside of Kentucky. Its property, though

intangible, had no situs in Kentucky. It was never here. It was taxable where the business was carried on. If it could be taxed here and elsewhere, it would be taxed twice. It can not be taxed here unless within the jurisdiction of the State under the repeated decisions of the United States Supreme Court."

This was followed by repeated declarations that "permanency" of deposits created "situs" either here or elsewhere in explicit language such as the following:

"If the money sought to be taxed had been sent to this State to **remain** here on deposit, or was on deposit for **permanent** purposes or if it was the **accumulation** or **income** derived from the business **done in this State** or if it was sent here for the purpose of investment, there would be no difficulty in holding it subject to taxation."

See **Commonwealth v. Prudential Life Insurance Co.**, 149 Ky. 380, 385, and cases therein cited.

The findings of fact by both the lower court and Court of Appeals show that—

- (1) The money sought to be taxed was permanently deposited in St. Louis.
- (2) That it was accumulations from business done in St. Louis.
- (3) That it was there for permanent purposes.
- (4) That it was deposited there by agents at the direction of the owner.
- (5) That in large part it was invested in certificates of deposit **permanently** kept in Missouri. (*Record, pages 175 and 263.*)

In face of these findings, the Appellate Court, upon the first appeal (*159 Ky. 323, rendered May 29, 1914*) reversed the case, but did not direct a dismissal of the petitions. The Federal question presented in this brief, although raised by pleading and argument, was neither discussed nor, in terms, decided. The lower court treated the reversal, however, without direction to dismiss the petition as establishing the law of the case as to "situs" against plaintiff in error, and thus binding on him. This in the face of his own statement that—

"the question is not free from difficulty by any means and should be decided for the defendant if certain language of the Court of Appeals and of the Supreme Court is to be taken literally and without qualification." (*Record, p. 177.*)

and in the face of the fact that his own review and analysis of the authorities show his conclusion would, except for the following language used by him, have probably been in favor of plaintiff in error:

"If the money on deposit in St. Louis had acquired a situs there, then the ruling in *Ewald Iron Company against Commonwealth* above mentioned is no longer authority in this State. **This court is required to hold that inasmuch as this question was presented to the Court of Appeals, when this case was before it, and the court could have ordered a dismissal of these actions if it had deemed the location of the property to be in St. Louis, that the question is not open.** *Ewald, etc., v. Commonwealth, 159 Ky. 323.*"

After the first decision in this case just referred to, the Avery case, 163 Ky. 828, came to the Court of Appeals, and its decision upon it was rendered March 26, 1916.

The facts of that case show a complete analogy with those here.

Avery & Sons, a domestic corporation, did business in Kentucky and elsewhere.

The Ewald Iron Company did business in Kentucky and elsewhere.

Avery had selling agents in Atlanta, Memphis, etc., who received Avery's goods from Louisville, where they were manufactured, and sold them in territory adjacent to the agency.

Ewald had a selling agent in St. Louis, who received the iron from Louisville, where it was manufactured, and sold it in territory outside of Kentucky.

Each agency kept books separate from those kept at the Kentucky offices.

Each deposited the collections from those sales in banks outside of Kentucky.

Each deposited through agents residing outside of Kentucky.

The Avery case, unlike this case, however, does **not** show that the money so deposited was to be permanently kept outside of Kentucky or was evidenced by certificates of deposits permanently kept outside of Kentucky.

The sole question considered was the situs of the assets shown on the books of the foreign selling agent.

The court carefully reviewed its own decisions and the decisions of this court, and not only finds that it is no "longer open to dispute" that tangible personal property present in another State so as to acquire a situs there, is—

"immune from taxation at the domicile of the owner,"

but says this rule has also been extended to open accounts, and cites the West India Oil case and the cases upon which the decision in that case is founded, and reaches the conclusion that the assets shown on the books of the selling agents are not assets having a taxable situs in Kentucky.

The opinion further says, with reference to the West India Oil case:

"We are urged by appellant to overrule that case, but are not inclined to do so."

It in no way refers to the opinion of May 29, 1914, in this case, or treats it as modifying or overruling the West India Oil case, or unsettling the established construction of Section 4020.

Notwithstanding these decisions, the final opinion in this case ignores them entirely, neither expressly nor impliedly overturning or modifying them as rules applicable to further actions of citizens of the State. It simply places plaintiff in error outside of the rule held to have been consistently and properly applied under Section 4020 without in any way indicating a purpose upon the

part of the court to lay down a new rule for future cases arising under that section.

Under such circumstances, how can it be claimed that plaintiff in error has received equal protection of the law? If the rule of the Dun case, the Hillman case, the Prudential case, the West India Oil case, and the Avery case had been overthrown and a new rule announced for future application **to all alike**, it might be plausibly claimed that the "equal protection" clause was not violated, because all future litigants would receive the same treatment as plaintiff in error. But not so. A decision is rendered which simply sets plaintiff in error "outside the past, present and future rule" applicable to cases arising under Section 4020, and thus denies it that equality of application of the law that the Fourteenth Amendment attempted to guarantee it.

For the foregoing reasons, I ask that the judgment of the Court of Appeals of Kentucky be reversed, and the St. Louis deposits in controversy held to have no situs subjecting them to taxation in Kentucky.

Respectfully submitted,

WILLIAM W. CRAWFORD,
Counsel for Plaintiff in Error.

WIDE SUPREME COURT, U. S.

FILED

OCT 1 1917

JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 424.

FIDELITY & COLUMBIA TRUST COM-
PANY, AS EXECUTOR AND TRUSTEE
OF THE ESTATE OF L. P. EWALD,
DECEASED, - - - - - Plaintiff in Error,

versus

CITY OF LOUISVILLE, - - - Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GEO. CARY TABB,
STUART CHEVALIER,
PENDLETON BECKLEY,
Counsel for Defendant in Error.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 424.

FIDELITY & COLUMBIA TRUST COMPANY, AS
EXECUTOR AND TRUSTEE OF THE ESTATE
OF L. P. EWALD, DECEASED, - *Plaintiff in Error*,

v. BRIEF FOR DEFENDANT IN ERROR.

CITY OF LOUISVILLE, - - *Defendant in Error*.

STATEMENT OF THE CASE.

This case comes up on a writ of error to the Court of Appeals of Kentucky. It involves the validity of a judgment upholding an assessment of taxes against the estate of L. P. Ewald, who was a resident and citizen of Louisville. The tax bills are based upon a retrospective assessment made in 1910 by the City of Louisville for the years 1907 and 1908 for "omitted personal property" belonging to the estate of L. P. Ewald, the judgment when paid amounting to over \$96,000.00. Ewald died in August, 1909.

During the years here involved there were large sums of money on deposit in St. Louis banks in the name of the Ewald Iron Company, of which com-

pany L. P. Ewald was the sole stockholder and the active manager and sole director. This company was chartered under the laws of Kentucky in 1880, but its charter had expired in November, 1905. The Court of Appeals held that under the corporation laws of the State the money on deposit in St. Louis in the name of the Ewald Iron Company was, therefore, the money of L. P. Ewald and not corporate money; that he retained exclusive control of it; that it was not connected with any business in St. Louis (Record, pp. 263 and 266); and that it was therefore taxable at Ewald's residence in the City of Louisville to him personally and not to the corporation. The amount of this deposit for the year 1907 was \$1,629,836.36, and for 1908, \$1,837,404.48. (Arbuckle, Record, p. 219.)

Practically all of this money represented the proceeds of iron manufactured at the factory in Louisville. There was a sales office maintained in St. Louis, but this money was in nowise connected with or under the control of that office, Ewald in Louisville reserving the exclusive right to check thereon. In fact, only \$25,000.00 (which was left on an open account in a separate bank), was kept for the current expenses of the mill in Louisville and of the St. Louis office and other expenses of the company; the rest of the money on deposit in St. Louis represented a surplus which had been accumulating for a number of years.

Ewald also kept in the name of the company, and mixed with this surplus, money which he derived from other sources such as rents, dividends from stock in other corporations, salary, etc.

The Ewald Iron Company also maintained an office in Chicago and one in New York.

No taxes, of course, were paid on any of this money or other property to the State of Missouri or to the City of St. Louis.

This case has been before the Court of Appeals of Kentucky a number of times, several of the opinions discussing different years but the same state of fact. The last opinion includes the two years here involved and the three preceding years. While the members of the Court divided on certain questions of local law, they were throughout unanimous in holding that the money had not acquired a taxing situs in St. Louis and six of the seven judges held that for the years 1907 and 1908 here involved it was the money of L. P. Ewald and not the money of the Ewald Iron Company.

It will be found that the various petitions and amended petitions in this record involve taxes for the years 1904 to 1910, inclusive, the assessing dates for each of these years being September 1 of the preceding year. The estate paid taxes to the City of Louisville for the years 1909 and 1910, after the decision in *Ewald Iron Co. v. Commonwealth*, 140 Ky. 692. With reference to the years 1904, 1905 and 1906 the majority of the lower Court were of the opinion

that the money on deposit in St. Louis in the name of the Ewald Iron Company was taxable in Lyon County, Ky., instead of Louisville, as Lyon County was the charter domicile of the iron company and its charter did not expire until November 5, 1905, after the assessing date for 1906. With reference to these years, however, the Court of Appeals in an extension of its opinion held that the record disclosed property belonging to L. P. Ewald other than the money on deposit in St. Louis banks, and that the proceedings were broad enough to cover this other property, and sent the case back with instructions to the lower Court to determine what other personal property Ewald owned individually and to enter a judgment in favor of the City for taxes thereon. That branch of the case is still pending below. The City of Louisville was given judgment for the years 1907 and 1908 for the full amount, these being the only years now before this Court.

It is to be kept in mind that the assessment in this case is not confined to money in bank, but is broad enough to include all the personal property belonging to L. P. Ewald. (Response of Court of Appeals to Petition for Modification and Extension of Opinion, Record, p. 271.)

We will show later on, *infra*, that when the tax bills sued upon were duly authenticated by the assessor over a *fac simile* of his signature the City made out a *prima facie* case under §2996, Kentucky Statutes, and that the burden then shifted to the plaintiff in er-

ror to prove that the taxpayer had not omitted from taxation property to the amount of the assessments herein. This burden the plaintiff in error has entirely failed to assume and has failed to overcome the *prima facie* case made out by the City under this statute.

Opposing counsel, however, has narrowed his case down to a discussion of a deposit in four banks in St. Louis on the assessing dates in the name of the Ewald Iron Company. We will waive, therefore, for the time being the question of the City's right to recover upon the strength of its *prima facie* case and the consideration of other personal property owned by Ewald, and will consider our right to tax these immense deposits in St. Louis banks in the name of the Ewald Iron Company.

Opposing counsel contends that these deposits were:

1. Accumulation or income from business done in Missouri; and

2. Placed permanently on deposit in St. Louis.

And that therefore they were taxable in St. Louis, and, being taxable in St. Louis, the Kentucky tax is imposed without due process of law.

He also contends that the Kentucky authorities are not in harmony with the decision of the Court in this case and that, therefore, the plaintiff in error has been denied the equal protection of the law.

We shall frankly discuss each of these contentions and endeavor to show that they are wholly without merit.

With reference to counsel's contention that these deposits were accumulation or income from business done in St. Louis, we reply :

1. That the Court of Appeals of Kentucky held that though this money was deposited in the name of the Ewald Iron Company, it belonged to Ewald individually and had been accumulated from the surplus earnings of the Ewald Iron Company, but that no part of it was used in the business of the company. The evidence shows that part of these funds came from dividends which L. P. Ewald received from stocks owned by him individually in other corporations, and from profits made by him in other transactions. We contend, since this money was not used in or connected with any business in St. Louis, or Missouri, but belonged to an individual, a resident of Louisville, that the principle of *mobilia sequuntur personam* applies and that the taxable situs of these deposits was Louisville, Kentucky.

2. Should the Court consider it material where the business was located out of which this money arose, we contend that the evidence and the findings of the lower Court very clearly establish that the amount and character of business done in St. Louis in the name of the Ewald Iron Company, as compared to the amount and character of business done in Louisville, were such as to make the property

taxable in Louisville rather than in St. Louis. In other words, there is much more reason to consider that this money had a "business situs" in Louisville than in St. Louis.

3. In all the cases which uphold the right of a State to tax intangible property of the kind involved here, because of its having acquired a "business situs," it will be found either (1) that the property taxed arose out of business done within the limits of the State and with residents of the State; or (2) that the property taxed, whether in the shape of negotiable notes, accounts or money on deposit, was under the control of a local agent who had the right to deal with the same, and, in the case of money on deposit, to check upon the same or that both of these conditions were present.

In the case at bar the money arose from the sale of iron all over the United States, as well as from dividends of L. P. Ewald on stocks in other corporations, and there is no evidence of any of the iron having been sold to any one in Missouri nor of any agent of Ewald's in St. Louis having any discretion in the running of the business or the right to check upon these deposits.

As to counsel's contention that these bank deposits were permanent deposits and therefore taxable in St. Louis, we reply that there is no such thing as a permanent bank deposit, and that the length of time a deposit has remained in a bank, or a note or certificate of deposit has remained in a State, has never

been made a test for determining their taxing situs.

As an answer to both of counsel's contention, we say that even should this Court consider that these deposits in St. Louis might have been taxed in Missouri, either on the ground that it acquired a business situs there, or because it was deposited there, nevertheless this presents no constitutional reason why a tax by Kentucky should not be upheld in return for the protection afforded the owner of the property.

As to opposing counsel's contention that the Kentucky authorities are not in harmony with the decision of the Court in the case at bar, and that therefore the plaintiff in error has been denied real protection of the law of Kentucky, we reply:

(a) That even if the Kentucky decisions are not in harmony, no Federal question is involved, and

(b) That the Kentucky decisions are in harmony with the case at bar.

We will endeavor to discuss these various questions in the order named above.

**PLAINTIFF IN ERROR IS NOT DEPRIVED OF ITS
PROPERTY WITHOUT DUE PROCESS
OF LAW.**

I.

As to Contention that the Deposits Were the Accumulation or Income from Business Done in Missouri.

A

THE MONEY ON DEPOSIT IN ST. LOUIS BELONGED TO EWALD INDIVIDUALLY, AND WAS NOT CONNECTED WITH ANY BUSINESS IN ST. LOUIS OR MISSOURI.

Referring then to our first point, that the lower Court found that though the deposits were in the name of the Ewald Iron Company they really belonged to Ewald and were not connected with, or necessary to, the business of the Ewald Iron Company, it seems only necessary to point to the findings of fact of the lower Court, as well as to the construction given to the Kentucky law by the lower Court, in this instance the corporation laws of Kentucky. (*Egan v. Hart*, 165 U. S. 188.)

With reference to this money, the Court of Appeals has this to say:

“It also appears that during these years all of the money on deposit in these four banks had been placed on deposit in the name of the Ewald Iron Co. by the direction of L. P. Ewald, and that it was at all times subject to checks drawn by him in the name of the Ewald Iron Co., and that no part of this fund so on deposit in these

banks was used in the business of the company. The money needed in the business of the company carried on in St. Louis was kept on deposit in another bank, and whenever any money was needed to carry on the business of the Ewald Iron Co., it was obtained by check drawn on this other bank in which the deposit was from time to time replenished as the necessities of the business required. *In short, the money mentioned, on deposit in the four banks, appears to have been accumulated from surplus earnings of the Ewald Iron Co. that were not needed in the conduct of its business.*" (Record, p. 263.)

(Italics throughout are ours.)

Further on the Court says:

"On the facts we all agree that the money in St. Louis had a situs in this State for taxation; and Chief Justice Miller and Judges Turner and Clarke are of the opinion that the judgment of the Jefferson Circuit Court should be affirmed in its entirety, upon the ground that the money sought to be taxed was, *during all of these years*, in fact the money of L. P. Ewald and not the money of the Ewald Iron Company; that although it was on deposit in St. Louis banks in the name of and to the credit of the Ewald Iron Co., it had been deposited by direction of L. P. Ewald and was subject to withdrawal only by him; that it was not used in carrying on the business of L. P. Ewald Iron Company; that it was placed on deposit to the credit of the Ewald Iron Company by L. P. Ewald in an effort to evade the tax laws of this State and to prevent it from being subjected to the taxes assessed against L. P. Ewald.

"Judges Settle, Hurt and Carroll are of the opinion that the money on deposit in the St.

Louis banks in the name of the Ewald Iron Co., and which had been made in the business conducted by this company, had a taxable situs at the charter home of the Ewald Iron Co., in Lyon County during the life of the corporation, and *until November 5, 1905*, and consequently the taxes payable in the years 1904, 1905 and 1906 were due in Lyon County; but *that after the life of the corporation expired*, and on the assessing periods of September 1, 1906, and 1907, this money had a taxable situs at *the home of L. P. Ewald in Louisville*, and *therefore the taxes due in 1907 and 1908, are payable in Louisville, Kentucky.*" (Record, p. 266.)

As to our statement that Ewald mixed with these funds dividends which he received from stock in corporations other than the Ewald Iron Company, see depositions of Marshall, Record, p. 197; Herrman, Record, p. 73.

In the light of these facts, it is immaterial where the business was done out of which these funds arose, since they had been disconnected and set apart from that business, mixed with funds belonging to Ewald individually and were not used in any business on any of the assessing dates. *We are not taxing the money of a St. Louis business or company, but the individual money of a resident of Louisville which has been left idly on deposit in banks outside of the State and, as found by the lower Court, was so left for the purpose of evading taxation in Kentucky.*

In the case of *Board of Assessors v. New York Life Insurance Co.*, 216 U. S. 515, where the Court was dealing with a deposit in a Louisiana bank of a large sum of cash to the credit of a foreign insurance company we find this language:

“The other consists of a bank account of \$50,700, kept separate from a small account for current expenses, admitted to be taxable. The account in question consists of deposits made solely for transmission to New York and *not used or drawn against by any one in Louisiana. We shall not inquire whether it would or would not be within the constitutional possibilities for a State to tax a person outside its jurisdiction for a bank deposit that only became his or came into existence as property at the moment of beginning a transit to him, and that thereafter left the State forthwith. It is enough to say we should not readily believe that the Supreme Court of the State would interpret the statutes of Louisiana as having that intent.*”

It may truly be said of a bank deposit that it is the most intangible of intangible property. It is elementary that the relation between the bank and its depositors is that of debtor and creditor simply, and not that of bailor and bailee, and it has been generally held that the taxable *situs* of bank deposits is at the domicile of the creditor, unless some other fact appears to show that the creditor has given it a taxable *situs* elsewhere.

There was no specific money in St. Louis to which Ewald or the Ewald Iron Company

was at any time entitled. Nor did his agents in St. Louis deposit actual money in the St. Louis banks. Most of the iron was paid for by checks and they simply turned over these checks to the banks. Even when actual cash was deposited by Ewald or his agents, that money at that moment ceased to be his, and all he had was the right to a credit on which he might draw. There was not one dollar in a single bank in St. Louis to which the depositor was entitled. If Ewald had left a bag of money in a safety deposit vault and kept the key, we might then be dealing with a chose in possession as distinguished from a chose in action, with tangible as distinguished from this most intangible property. This distinction has been recognized in numerous cases, among others by this Court in *Board of Assessors v. New York Life Ins. Co., supra*.

Notice in the above quotation from that case the importance given to the fact that the deposit was "not used or drawn against by any one in Louisiana." The facts of this case will be found more fully stated in 158 Fed. 474, where it was shown that the Louisiana cases relied upon held bank deposits taxable in that State *only when they could be drawn upon by the local agent* and were, therefore, under his control.

The cases from other States are in full accord with this rule.

In *Pacific Coast Savings Society v. San Francisco* (Cal.), 65 Pac. 16, it was held that where there

has been a balance to the credit of a California corporation in a New York Bank, such balance due was properly taxed to the corporation in California, there being no one in New York who had power or right to draw on said balance, this being done from California.

In *Pyle v. Brennemann*, 122 Fed. 787 (C. C. A.), it was held that a deposit in bank to the credit of the depositor and subject to his check is a debt, and not property, and its *situs*, for the purpose of taxation, is in the State of the depositor's domicile.

In *Pendleton v. Commonwealth* (Va.), 65 S. E. 536, it was held that a general deposit in a bank creates the relation of debtor and creditor between the bank and the depositor, and though called a deposit, it is not a bailment. It was further held that under the Code provision of that State, making all personal estate within the Commonwealth, and the money and credits of persons residing therein subject to taxation, general deposits of a non-resident's money in a bank of that State are not taxable in Virginia.

In *State v. Clements National Bank*, 78 Atl. 944, 957 (Vt.), it was held that under the rule that intangible personal property has no independent *situs*, but follows that of its owner and can be taxed only where the owner resides, the State has no power to tax the credit to which a non-resident owner of a legal *interest-bearing* national bank deposit is entitled.

In *State v. Tennessee Coal, Iron & R. R. Co.* (Tenn.), 29 S. W. 116, the Court, in holding a bank deposit taxable only at the domicile of the owner, says:

“Cash on deposit is, in legal effect, only a chose in action; that is, an indebtedness of the bank to the depositor, who has no interest in any specific money by virtue of his deposit, but only a right to check generally against the fund in the bank. * * * Unless we hold such intangible property to be legally situated and taxable at the domicil of the corporation, where the statute does not prescribe a different *situs*, the effect will necessarily be to permit such as may be in other States, or even counties, to escape taxation altogether. It can not be held that the assessor must hunt down and locate each note and duebill, and the cash that may for convenience be located in different banks; and, even if he must, still he would be stopped in his search by the lines of the State, and, so far as county revenue is concerned, by the lines of each county. *Under such a construction, the company could place its notes and books of account in one of its offices in preference to another, or remove them to its New York or Birmingham office, and escape taxation altogether, as the assessor could never locate this most difficult of all property by its actual situs.*”

So here, if such a construction were sound, every cent of intangible property owned by citizens of Louisville could be made to escape taxation for State and City purposes by the simple device of being transferred to New Albany or Jeffersonville, across the river in Indiana. The Courts will scarcely coun-

tenance a rule which would be so unsound in principle and so disastrous in its practical effect. It is difficult enough as it is to reach and tax intangible property which is in a chronic state of being a "fugitive from taxation."

The nearest approach to a physical symbol of the surplus deposits in the case at bar is to be found in the daily balance sheets which were sent to Ewald in Louisville. The fact that these deposits were allowed to remain in St. Louis some length of time does not affect the situation, as the length of time a deposit remains does not seem to have ever been made the test of its taxing situs. We will show later on that such a test would be impracticable.

B

LOUISVILLE'S CLAIM FOR A "BUSINESS SITUS" IS GREATER THAN THAT OF ST. LOUIS.

If this Court should consider it material where the business was located or done out of which this money arose, the evidence and findings of the Court of Appeals clearly establish that the amount and character of business done in St. Louis in the name of the Ewald Iron Company, as compared with the amount and character of the business done in Louisville, were such as to make the "business situs" of these deposits in Louisville, rather than in St. Louis. In other words, that Louisville's claim to a "business

situs" is greater than that of St. Louis, thus strengthening the claim of Louisville to the tax as the domicile of the owner.

In order to develop our argument in this connection, it is necessary to go rather fully into the history of the Ewald Iron Company and its method of conducting business and to show the relationship between the business done in Louisville and in St. Louis. It should be kept in mind throughout this discussion that the business out of which practically all the money involved arose, was the manufacture of iron in the City of Louisville; that there was only a trifling amount represented by the purchase and reselling of iron manufactured elsewhere which was known as "Accommodation Iron," to which we shall refer later.

Before the formation or incorporation of the Ewald Iron Company, L. P. Ewald had been in the iron business in St. Louis under the firm name of L. P. Ewald & Company and other names. As such he did not manufacture iron but simply bought and sold iron and was known as a "jobber." (Herrman, Record, p. 80; Sweeney, Record, p. 88; Burg, Record, p. 65.)

In 1880 Ewald bought an iron mill at "Tennessee Rolling Works" south of Eddyville on the Cumberland River in Kentucky, and incorporated the Ewald Iron Company under the laws of Kentucky. Its articles of incorporation expressly stated its purpose to be the *manufacture of iron*, and the sale of the prod-

uct of its manufacture and such articles as are connected therewith, and its principal place of business was fixed at Tennessee Rolling Works, Lyon County, Kentucky. Ewald thereupon left St. Louis and went to Tennessee Rolling Works to live and *for the first time began the manufacture of iron*. An office was established in connection with the mill in Lyon County. Orders were received there and goods were shipped from there to all parts of the United States. (Cunningham, Record, p. 151, qq. 8 to 12.)

Because of bad transportation facilities the operations in Lyon County were not successful, and in 1886 the mill there was abandoned. Another mill was purchased in Louisville, Kentucky, and the business which had been done in Lyon County *was entirely moved to Louisville*. In this connection the Court of Appeals found that after 1886 the Ewald Iron Company did not carry on in any manner or form the business of manufacturing iron in Lyon County. "In fact," says the Court, "its business in this respect was as completely removed to Louisville and there carried on as if it had never established or maintained a plant in Lyon County." (Record, p. 262.)

"From the time of the removal to Louisville," continuing to quote from the opinion of the Court of Appeals, "until the expiration of the Charter in 1905, the entire business of the company in this State was carried on in the name of the company in Louisville, although the corporate home of the company,

under the articles of incorporation, continued to be in Lyon County. When the life of the corporation expired on December (November) 5, 1905, the business continued to be conducted in the name of the Ewald Iron Company, at Louisville, Kentucky, exactly in the same manner that it had been conducted during the life of the corporation, and this method of conducting business continued without interruption until September, 1909.

“Prior to 1904 L. P. Ewald by the purchase of the stock *became the sole stockholder of the company* and so continued to be until his death in July, 1909, and *during all of this time*, and for many years prior thereto, *he had been continuously a resident of the City of Louisville.*”

In this connection it should be stated that Ewald's fortune, practically all of which seems to have been made out of the manufacture of iron, was made after the removal of the Ewald Iron Company from Lyon County to Louisville. (Marshall, Record, p. 209.)

From the time of the establishment of the Ewald Iron Company in Lyon County, Kentucky, in 1880, the St. Louis office was nothing but a sales office. Ewald spent most of his time at the mill, in Lyon County, and from that place kept in touch with everything that was done by the company, including the work of the office at St. Louis. (Herrman, Record, p. 77.) And after the removal of the company to Louisville the St. Louis office continued to be nothing but a sales office. The lower Court speaks of St. Louis as

"the distributing point for the product the Ewald Iron Company manufactured in Louisville." "In other words," says the Court, "the Ewald Iron Company maintained an office in St. Louis, and all of its product was sold through this office, and the proceeds of sale paid into this office." (Record, p. 263.)

Opposing counsel says that the trial court found that money received from customers by direct sales from the mill office or sent to the mill office was deposited in the Bank of Kentucky at Louisville. There is no such finding. Nor is there a finding to the effect that the secretary or assistant treasurer of this company had charge of the St. Louis office or were paid by that office.

It is hard to conceive of a system by which an office could be more completely under the domination of one man than the system disclosed here by which L. P. Ewald controlled from Louisville the St. Louis office of his company, as well as the Chicago and New York offices. Every morning, about eleven o'clock, the St. Louis office telegraphed to Ewald in Louisville, advising him of all orders received in the morning mail. Regularly at 2:30 in the afternoon Ewald telephoned from Louisville to St. Louis, giving explicit directions with reference to said orders. At 5:30 in the afternoon regularly Ewald telephoned again to St. Louis to learn what had transpired since 2:30 and to give further instructions. Every night his confidential man in St. Louis wrote Ewald in long-hand, making such reports as were deemed nec-

essary. *This routine was carried out each day.* (Sweeney, Record, p. 89; Marshall, Record, p. 193; Herrman, Record, p. 71.) Ewald had half a dozen telephones at his residence in Louisville and several in his room at the Galt House when he was living there, and in this way he kept in absolute touch with the affairs of the company from Louisville. (Marshall, Record, p. 193, qq. 28 to 32.)

“Ewald personally managed and controlled the office at St. Louis, hiring and discharging managers, bookkeepers and salesmen.” (Opinion Circuit Court, Record, p. 175.) He kept in constant touch with the New York and Chicago offices by telephone also. (Marshall, Record, p. 193, qq. 23-28.)

During the years involved here, that is, in 1907 and 1908, Ewald was not in St. Louis at all. (Marshall, Record, p. 192.)

With reference to Ewald's control of money on deposit in St. Louis banks, we have already quoted from the opinion of the lower Court, *supra*. The deposit referred to as being used to carry on the business of the Ewald Iron Company was the sum of \$25,000.00, which was kept in the Franklin Bank. This sum was checked upon in this way: Some one in the St. Louis office would send over to Louisville to Ewald a number of blank checks on the Franklin Bank. He would make them out in blank amount, payable to Mr. Sweeney or Mr. Herrman or Mr. Arbuckle, whoever the agent might be, sign them and send them back to St. Louis. Then,

Ewald Alor
Had Power
to Check
Upon Fund
in St. Louis

as money was needed in the St. Louis office, Ewald would instruct one of these men in St. Louis during the day by telephone from Louisville to fill in such check or checks for such amounts as he designated and endorse them to the party to whom they were to be paid. (Sweeney, Record, p. 90; Herrman, Record, p. 73.) When money was sent to Louisville for the expenses of the mill pursuant to Ewald's direction, it was gotten by taking one of the checks which Ewald had previously signed on the Franklin Bank and getting a New York draft payable to Ewald or the Ewald Iron Company in Louisville and sending that draft to Louisville. (Herrman, Record, p. 70; Sweeney, Record, p. 90.)

With reference to the immense deposits in the four St. Louis banks, which for the most part form the basis of the tax bills involved here, *it is important to note that when money was once deposited in these banks no one in St. Louis ever heard of it any more. The record shows that no one in St. Louis ever checked upon these funds.* (Herrman, Record, p. 74.)

Not only were all checks, whether on the surplus fund or the \$25,000.00 in the Franklin Bank, drawn by Ewald in Louisville, but daily balance sheets were sent to him in Louisville, showing how much money the Ewald Iron Company had on deposit, whether as surplus or in the Franklin Bank. (Marshall, Record, p. 212, qq. 182, 260 to 266, 320, 321; Sweeney, Record, p. 89, q. 176.) We contend that this fact is

conclusive as to who had control of this money, and as to its taxable situs.

Opposing counsel speaks of "iron purchased by the St. Louis office in the open market and resold by that office." The record shows that after the formation of the Ewald Iron Company the company continued to buy and sell some of the cheaper grades of iron which the old firm of L. P. Ewald & Company had been handling as jobbers in St. Louis, but this iron was carried only to "accommodate" the customers of the Ewald Iron Company who bought the higher grades of iron manufactured by the company, and was really known as "accommodation iron." The business done in handling this "accommodation iron" was insignificant in comparison with the handling of the higher grades of iron manufactured by the company. (Herrman, Record, pp. 80, 81; Sweeney, Record, p. 88; Marshall, Record, p. 196.) And Ewald even attended to the buying of this "accommodation iron." (Marshall, Record, p. 207.)

Iron Purchased and Sold in St. Louis Was Only Accommodation Iron.

The Circuit Court refers to this "accommodation iron" as follows:

"A small amount of iron of an inferior grade was purchased by the St. Louis agency to supply the needs of some customers, largely as an accommodation to the trade."

Ewald only pushed the iron which he manufactured, and no other iron was advertised. The principal business of the Ewald Iron Company was that of manufacturing high grades of bar iron and steel

slabs or sheets and selling the same, and practically all of the fortune made by Ewald came from the iron manufactured in Louisville. (Sweeney, Record, p. 88; Herrman, Record, p. 80; Arbuckle, Record, p. 223; Marshall, Record, p. 196.) *This was the object of the corporation, and it was all done in Louisville.* There is no showing that any large profits were made out of this "accommodation iron." In other words, this immense fortune left on deposit would never have been accumulated from the business done in "accommodation iron." As has already been said, the Ewald Iron Company was not a success financially until after it began manufacturing iron in Louisville.

**The Reason
Why Most
of the Iron
Was Billed
Through
St. Louis.**

The reason why most of the iron manufactured in Louisville was billed through St. Louis is that most of the business of the Ewald Iron Company was done west of St. Louis and, of course, freight rates from Louisville to St. Louis were less on car-load lots than on small shipments. The Ewald Iron Company, in Louisville, would fill a car with shipments for various points beyond St. Louis, directing the shipments "right to the customers," would bill the car to St. Louis and have the St. Louis office rehandle the shipments and send them on to destination. (Marshall, Record, p. 196, qq. 75, 76.) It seems that the St. Louis office was really a rehandling office and that the account of the sales was kept there.

As a further proof that no one in St. Louis had any discretion in any matters connected with the business of the Ewald Iron Company, we should refer to the fact that Ewald in Louisville dictated and controlled the price of all goods sold by the company (Herrman, Record, p. 79; Sweeney, Record, p. 101); he controlled the finances of the company (Sweeney, Record, p. 101), and kept in touch with all the iron bought by the company. Even specifications for bar iron [accommodation iron], drawn up in St. Louis, were sent to Louisville for his approval. (Marshall, Record, p. 193.) While the salesmen were paid from the St. Louis office, all of them were employed by Ewald either directly or through others acting under his absolute instructions and without discretion. (Sweeney, Record, pp. 100, 101.) He kept in touch with his salesmen by long distance telephone from Louisville (Marshall, Record, p. 193, q. 27), and they reported to him personally in Louisville. (Marshall, Record, p. 193, qq. 23, 24, 151-159, 241-243; Herrman, Record, p. 79.)

**Ewald Fixed
All Prices,
Controlled
the Finance
of the Com-
pany, and
Employed
All the
Salesmen.**

Opposing counsel says that the findings of both the lower Court and the Court of Appeals show that the money on deposit in St. Louis was "accumulations from business done in St. Louis." Counsel is mistaken in this. The findings of neither Court show this.

Counsel has always tried to show that the Ewald Iron Company in Louisville dealt with the St. Louis office as though the St. Louis office were another con-

cern, and that the money on deposit in St. Louis accrued exclusively from business done by the St. Louis office. It is true that the Louisville books of the company only showed a profit over and above the cost of production in the price at which the goods were billed to St. Louis, and the St. Louis office showed a profit over and above the price at which the iron was billed to St. Louis. By this scheme no one but Ewald knew what profit he was making, for the employes in St. Louis did not know what profit the Louisville books showed, and the employes in Louisville did not know what profit the St. Louis books showed. The iron manufactured in Louisville was shipped to St. Louis at a given price *fixed by Ewald* and the St. Louis office sold it at an advanced price *fixed by Ewald*. This advanced price was collected by the St. Louis office and *all of it* deposited in St. Louis banks. (Sweeney, Record, p. 89; Maratta, Record, p. 183, qq. 19 and 43-46; Marshall, Record, p. 196.)

This does not support the claim that these deposits accrued from business done in St. Louis. *Where were the profits, shown on the Louisville books, deposited, if not in these same St. Louis banks?* Certainly, it can not be said that because the St. Louis books showed the total amount on deposit in St. Louis banks, and because the St. Louis office collected these sums and deposited them, that therefore the money on deposit in St. Louis accrued exclusively from business done by the St. Louis office.

In the light of the above facts, it seems clear to us that if the right to tax these St. Louis deposits is to be determined by deciding where they had a "business situs" Louisville has a greater claim to the tax than St. Louis.

CERTIFICATES OF DEPOSIT MAY BE ELIMINATED.

Before passing to the next point we wish to refer to the certificate of deposits mentioned in the record. Counsel makes much of the fact that part of the surplus funds on deposit in St. Louis was in the shape of certificates of deposit, and that these certificates of deposit were kept in St. Louis. While we will show that the mere presence of these certificates in St. Louis was not sufficient to make them taxable there, nevertheless we might waive all contention regarding the certificates of deposit, for the record shows that on September 1, 1906, only \$114,529.90 of the \$1,629,836.36, on deposit in the four banks, and on September 1, 1907, only \$117,965.80 of the \$1,837,444.48 on deposit, were in the shape of certificates of deposit. (Arbuckle, Record, p. 219.) The amounts of the certificates of deposit might be deducted from the total deposit and leave sufficient to sustain the assessment involved, if we take into consideration the 850 shares of stock in the Helmbacher Forge & Rolling Mill Company valued

at \$130.00* per share, and the 500 shares of stock in the Granby Mining & Smelting Company valued at \$85.00** per share, and the salary due L. P. Ewald by the Ewald Iron Company, which on September 1, 1906, was \$20,786.80 (Arbuckle, q. 76, Record, p. 218) and on September 1, 1907, \$25,662.60 (Arbuckle, q. 77, Record, p. 218), to say nothing of a deposit in the Boatman's Bank in St. Louis in Ewald's individual name, which plaintiff in error failed to disclose but which was shown to have existed.

C

**MONEY ON DEPOSIT MUST EITHER ARISE OUT OF BUSINESS
DONE WITHIN THE STATE WITH RESIDENTS THEREOF,
OR BE UNDER THE CHECKING CONTROL OF A
LOCAL AGENT IF IT IS TO ACQUIRE A
"BUSINESS SITUS" THERE.**

We come now to a discussion of the cases cited by opposing counsel. There is a clear distinction between these cases and the case at bar, nor do they support his contention that the surplus on deposit in St. Louis banks in the name of the Ewald Iron Company had acquired a taxable situs in St. Louis.

*As to the number of shares of stock, see Annual Settlements, St. Louis Union Trust Company, Record, p. 124; Botts' Deposition, qq. 53-55, Record, p. 247; Response of Court of Appeals to Petition for Modification and Extension of Opinion, Record, p. 271.

As to the value of this stock, see Buick's Deposition, Record, p. 68.

**For evidence as to the amount of this stock, see Annual Schedule filed by the St. Louis Union Trust Company, Record, p. 124; Beer's Deposition, Record, p. 81; Response of Court of Appeals to Petition for Modification and Extension of Opinion, Record, p. 271.

As to the value of this stock, see Beer's Deposition, Record, p. 82 and following.

It will be noticed that in the cases cited by him two different classes of intangible property are involved, to-wit: (a) notes or credits and (b) money on deposit.

With reference to the cases involving notes or credits, it will be found that the notes were given by citizens of the State seeking to impose the tax and usually were secured by mortgage upon real estate within the jurisdiction of the State. It will be found that the credits were due from citizens of the State seeking to impose the tax. In other words, the notes or credits represented business done within the limits of the State seeking to impose the tax, and it was this fact that gave them a taxable situs.

With reference to the cases involving the taxation of money on deposit by a State other than that of the residence of the owner, so far as we have found in all the cases from this Court, the money came from business done within the limits of the State and seems to have been money derived from the collection of notes, or the doing of business, such as an insurance business, *within the limits of the State and with the citizens of the State*, and this fact seems to have been the determining fact in giving the State jurisdiction to tax.

There are cases from the State Courts, including Kentucky, in which money on deposit belonging to a non-resident was subjected to taxation, although the money does not seem to have come exclusively from business done within the limits of the State. (*Blue-*

field's Banana Co. v. New Orleans Bd. of Assessors, 49 La. Ann. 43.) But in this class of cases the corporation or owner of the property had an agent in the State, and it will be found, as was said in the *Banana* case, that "part of the proceeds were held in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent. Also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to." Whereas, in the case at bar, none of this money deposited in the four banks was subject to check by any agent in St. Louis, or any one other than Ewald in Louisville; nor was any of the sum used in any way in the business of the company, or any other business in St. Louis.

In the case of—

New Orleans v. Stempel, 175 U. S. 309,

the property sought to be taxed was credits and money in bank, and the source of these credits and money in bank is thus described in the opinion of the Court:

"It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the City of New Orleans, in possession of an agent of the plaintiff, who collected the interest and principal as it became due

and deposited the same in a bank in New Orleans to the credit of the plaintiff. The question, therefore, is distinctly presented whether, because the owners were domiciled in the State of New York, the moneys so deposited in a bank within the limits of the State of Louisiana, and the notes secured by mortgages situated and held as above described, were free from taxation in the latter State."

This case seems to be the pioneer case in this Court upholding the right of a State, other than the domicile of the owner, to tax this particular kind of intangible property. The Court reviews various State Courts and some of the previous decisions of this Court which recognize the power of the State to tax securities situated within its limits.

Notice, however, that in this Stempel case notes and credits came from, or were due from, citizens of the State of Louisiana, and that many of the notes were secured by mortgages on property in New Orleans, and that the money on deposit was money which came from the payment of these notes or accounts.

In the case of

Bristol v. Washington County,
177 U. S. 133,

the State of Minnesota levied a tax on the estate of Sophira M. Bristol, which tax was based on notes held by the decedent against citizens of Minnesota and secured by mortgage in Minnesota. It was

shown that for many years Sophira Bristol, and, prior to her, her father, Cyrus Jefferson, had been loaning money in Minnesota and taking notes secured by mortgage on lands in Minnesota. The agent in Minnesota collected the moneys and reinvested same and only remitted to Mrs. Bristol or Cyrus Jefferson such amounts as they needed. This Court puts the question deciding the Bristol case in this language:

"The main question in the case was ^{whether} ~~were~~ the credits due to a resident of another State, *from residents within Minnesota*, for moneys loaned and invested by, and which credits were managed and controlled by, an agent of the creditor, resident within Minnesota, could be taxed in Minnesota under the existing statute, * * *" It was held that such property could be taxed by Minnesota.

In another connection this Court says:

"The *business of loaning* money through the agency in Minnesota was continued during all of these years just as it had been before." * * *

After referring to the fact that for part of the time involved the Minnesota agent had sent the notes to Mrs. Bristol at her residence in New York, and that they were not sent back to Minnesota until they became due, the Court uses this language:

"Persons are not permitted to avail themselves for their own benefit of the laws of the State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."

So in

Metropolitan Life Ins. Co. v. New Orleans,
205 U. S. 395,

it appeared that the insurance company was in the *business* of lending money in Louisiana and employed a *local agent* to conduct the business. To escape taxation it removed from the State the notes taken for the money and had them sent to the home office in New York. These are the distinguishing facts of this case. This Court in holding the money taxable in Louisiana said:

“In this case the controlling consideration was the presence in the State of the capital employed in the *business of lending money*, and the fact that the notes were not continuously present was regarded as immaterial.

“It is impossible to distinguish the case now before us from the Bristol case (177 U. S. 133). Here the loans were negotiated, the notes signed, the security taken, the interest collected and the debts paid within the State. The notes and securities were in Louisiana whenever the business exigencies required them to be there.” (The money was in Kentucky whenever Ewald chose to draw on it.) “Their removal with the intent that they shall return whenever needed, their *long continued* though not permanent absence, can not have the effect of releasing them as the representatives of investments in business in the State from its taxing power. The law may well regard *the place of their origin*, to which they intend to return, as their true home, and leave out of account temporary absences *however long*

continued. * * * We are not dealing here merely with a single credit or a series of separate credits, but with a *business*."

The case of

Liverpool, London and Globe Ins. Co. v. Board of Assessors, 221 U. S. 346,

is practically the same as the Stempel, Bristol and Metropolitan cases. The tax involved here was on credits due the Liverpool, London and Globe *by policyholders in the State of Louisiana* as premiums. With reference to them this Court says in the course of its opinion:

"The credits would have had no existence save for the permission of Louisiana; they issued from the business *transacted under her sanction within her borders*; the sums were payable by persons *domiciled within the State*, and there the rights of the creditor were to be enforced."

The Court quotes with approval the following language from *Metropolitan Life Ins. Co. v. New Orleans*, *supra*:

"We are not dealing here merely with a single credit or series of separate credits, *but with a business*. The insurance company chose to enter into the *business of lending money* within the State of Louisiana, and employed a local agent to conduct that business."

Following this quotation the Court then says:

"Equally, then, had the State the power to tax the premium accounts here involved. They

were not withdrawn from its constitutional authority, either by reason of the fact that they were payable in consideration of insurance, instead of loans or goods sold, or by the circumstance that the credits were not evidenced by written instruments. They were none the less enforceable credits *arising in the local business.*"

It can not be said in the case at bar that we are dealing with a "series of credits," or a "local business."

The Court will notice that in each of the above cases there was a statute in the State imposing the tax which fixed the taxable *situs* of the property sought to be taxed. And this Court was largely bound by the findings of the lower Court as to whether or not the property sought to be taxed came within the purview of the State statute, the only question left to this Court being whether the State violated any provision of the Constitution in levying the tax. Thus in each of these cases there had been an adjudication by the State Court that the property involved had a "business situs" within the State, whereas in the case at bar there has been no attempt on the part of Missouri to fix a "business situs" in St. Louis under which these deposits could have been taxed. No statute of Missouri is cited to show that these deposits are, or were subject to taxation in Missouri. In other words, opposing counsel would have this Court speculate as to whether or not, if Missouri had a statute similar to the statute involved in the New Orleans cases, these deposits in the St.

Louis banks could have been subjected to taxation by St. Louis. And he contends that could this possibly have been done, then the tax by Kentucky, *the domicile of the owner of the property*, is unconstitutional. No doubt, did this case involve taxation by the State of Missouri on these deposits, opposing counsel would have little difficulty in distinguishing the cases cited by him, as we have done above.

Cases will be found in the State Courts and in the lower Federal Courts in which a tax on intangible property, such as notes and deposits in bank, have been upheld in a State other than the domicile of the owner, but in those cases it will also be found either that there was a "business of lending money," or some other business conducted with the citizens of the particular State and limited to the jurisdiction of that State, or that there was a *local agent* of the owner in the State imposing the tax, who had complete control of the investments, or, in the case of bank deposits, had the right to check upon such deposits.

In this connection we call the Court's attention to a very clear statement of the law regarding the taxable situs of intangible property by Judge Taft, in the case of *Walker v. Jack*, 88 Fed. 576 (C. C. A.), as follows:

"Intangible personal property, however, like choses in action and credits, can, as a general rule, only be taxed at the residence of the owner.
* * * Certain exceptions to this rule are recog-

nized. One is where the chose in actions is represented by a negotiable bond, property in which *passes by delivery*. In such a case the evidence of title is in such form, and is so important an element of the value of what it represents as to make it closely analogous to *tangible* property, and to give it a *situs* for taxation where the negotiable evidence of its existence actually is, even though the owner may live elsewhere. This exception is commented on by Mr. Justice Field in delivering the opinion of the Court in the case of *State Tax on Foreign-held Bonds*. (15 Wall. 300.) *Another exception* is where, though the beneficial interest in the debt is owned by a non-resident, yet the money is invested, the debt is contracted, and the investment is controlled, by a resident agent of the owner. In such a case it is held that the money and the credit in which it is invested are within the State, where the agent receives the money for his principal, and makes the loan, having authority to collect it and re-invest it."

In this case on a later hearing before the District Court (*Jack v. Walker*, 96 Fed. 578), it was held that connection with the loans in the way of clerical aid rather than as agent in possession and control for investment and reinvestment was insufficient, *but the resident agent must have the actual and effective control over the securities in order to give them a taxing situs.*

*See Note L.R.A (1915C) 903,
914-930, 938*

Involving
 CASES ~~SHOWING~~ TAXES ON FRANCHISES AND ON TANGIBLE
 PROPERTY ARE DISTINGUISHABLE FROM THE
 CASE AT BAR.

Opposing counsel quotes at length from the cases of *Adams Express Co. v. Ohio*, 166 U. S. 218, *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 397, and *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 202, to show that this Court has held that personal property can acquire a taxable *situs* distinct from the domicile of the owner. This is true, but those cases involved an entirely different kind of property from that involved here.

It is confusing to mix a discussion of the *situs* of franchises or of tangible property, such as was involved in those cases with a discussion of the *situs* of a bank deposit. It has been held, for instance, that "public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions" have a taxable *situs* where found. As this Court said, with reference to them in *Re State Tax on Foreign-held Bonds*, 15 Wall. 300, quoted with approval in the Stempel case, *supra*, "the former by general usage have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and passed as money wherever they are."

It would be confusing to mix up a discussion of this class of property with a discussion of a bank

deposit, and just so is it confusing to mix up a discussion of a franchise tax, such as was involved in the

Adams Express Company

case. The right of the State to levy the franchise tax, in the Adams Express Company case, was by virtue of the business done by that company within the limits of the State imposing the tax. As was pointed out by the Court in the opinion, it could not be said that the twelve million dollars of intangible property of the Adams Express Company, over and above its four millions of tangible property, was located at any particular place. It was rather distributed throughout the States in which the company was doing business and each State had the right to levy a tax only *in proportion to the amount of business done within its limits*.

The case at bar involves the taxation of an entirely different class of property. We are not dealing here with the "good will," or any franchise value of the Ewald Iron Company over and above its assets. We are not considering whether St. Louis, or Missouri could levy a tax upon the property of this company *in proportion to the amount of business it did in St. Louis, or Missouri*. Upon what theory would Missouri have a right to levy a tax upon the *entire* deposits made in the name of this company which did business all over the United States, simply because it had a sales and distributing office in St.

Louis, and deposited its money there? The only use that could be made of the Adams Express Company case, with reference to these deposits, would be in case St. Louis or Missouri were trying to impose a tax upon the property of this company *in proportion to the amount of business done within its limits*.

The case of

Louisville & Jeffersonville Ferry Co. v. Kentucky,
188 U. S. 397,

also involved a franchise tax and is also clearly distinguishable from the case at bar.

In this case the State of Kentucky sought to include in a franchise tax levied against the *Louisville & Jeffersonville Ferry Company*, the franchise which the State of Indiana had granted to operate a ferry from the Indiana shore. This Court held that the State of Kentucky had no right to levy a tax upon the franchise granted by the State of Indiana. It was perfectly clear, however, that the franchise granted by the State of Indiana was peculiarly property outside the State of Kentucky, as was said by this Court in the opinion:

“We recognize the difficulty which sometimes exists in particular cases in determining the situs of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No

difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky."

We do not understand how this case can be used as an argument to support counsel's contention that the deposits made under the facts and circumstances of this case, had a taxable situs in St. Louis. Certainly these deposits were in many ways directly connected with Louisville, and not peculiarly confined within the jurisdiction of St. Louis or Missouri.

The case of

Union Refrigerator Transit Co. v. Kentucky,
199 U. S. 202,

deals only with the taxable *situs* of *tangible* property admitted to be permanently located in other States than the domicile of the owner and employed there in the prosecution of its business. All that this case decides is that where tangible personal property is permanently located in a State other than the domicile of the owner, it is not subject to taxation by the domicile of the owner.

The Court discusses at some length the difference between tangible and intangible property and points out that intangible property is held secretly; that there is no method by which its existence or ownership can be ascertained in a State other than the domicile

of its owner, except perhaps in the case of mortgages or shares of stock, and that if the owner be discovered, there is no way by which he can be reached by a process in a State other than that of his domicile, or the collection of the tax otherwise enforced. The Court makes it clear that therefore with reference to *intangible* property, the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt.

At the close of its opinion this Court shows very clearly that the case has only to do with tangible personal property, the Court saying:

“It is unnecessary to say that this case does not involve the question of the taxation of *intangible personal property*, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, *which are controlled by different considerations.*”

In the case of

Delaware, L. & W. R. v. Pennsylvania,
198 U. S. 357,

cited by opposing counsel, the State of Pennsylvania sought to include in the taxation of the capital stock of a domestic company, the value of coal mined by the company within the State, but situated in other States and there awaiting sale when the appraise-

ment was made. It was admitted in this case that the State had no right to levy a direct tax upon the coal referred to, but it was claimed that the tax was not *eo nomine* or specifically upon the coal, and that the State had the right to consider the value of the coal as having entered into the value of the capital stock as soon as it was mined, and therefore had the right to treat the coal as one of the items that went into the value of the capital stock.

This Court refused to accept the distinction sought to be made by counsel for Pennsylvania and held that since the coal itself could not be specifically taxed, because outside of the jurisdiction of the State, the tax could not become legal by levying it upon the capital stock to the extent that the capital stock represented the property outside of the State. This case, it seems to us, is not different in principle from the Union Refrigerator Transit Co. case and of no value one way or the other in the case at bar.

This concludes the cases cited by opposing counsel in which property has been held to have acquired a "business situs," and the franchise cases. Counsel contends, however, that the surplus on deposit in St. Louis banks was a permanent deposit and for that reason had a taxable *situs* there.

II.

It Has Never Been Held that the Mere Presence of a Deposit in a State Gives that State a Right to Levy a Property Tax Upon It.

Opposing counsel says that the findings of fact by the lower Court and the Court of Appeals show:

“That the money sought to be taxed was permanently deposited in St. Louis” and “that it was there for permanent purposes.”

There is no such finding.

We know of no case from this Court holding that a *property* tax may be levied upon a bank deposit or even a note by a State other than the domicile of the owner, merely by reason of its presence in the State, no matter how long continued. In fact the case of *Buck v. Beach*, 206 U. S. 392, holds to the contrary, as we shall hereafter point out. But opposing counsel lays great stress upon a *dictum* in the case of *Hillman Land & Iron Co. v. Commonwealth*, 148 Ky. 331, which dictum occurs in a long quotation in the opinion of the Court in the case of *Commonwealth v. Prudential Life Insurance Co.*, 149 Ky. 380, and is as follows:

“If the money sought to be taxed had been sent to this State to remain here on deposit, or was on deposit for permanent purposes, or if it was the accumulation or income derived from the business done in this State, or if it was sent here for the purpose of being invested, there would be no difficulty in holding that it was subject to taxation.”

Only a few words are necessary to show that the Court in this language above quoted did not intend that the tests mentioned of *situs* were to be taken independently and disjunctively, as a cursory reading might indicate. For in neither the Hillman Land Company case, nor the Prudential case, did the Court have before it the question as to the taxable *situs* of money which had been sent to the State to remain on deposit, or which was on deposit for permanent purposes. The Kentucky Court had held, in the case of *Commonwealth v. R. G. Dun & Co.*, 126 Ky. 109, that money which had been left on deposit for a month, or even less, was taxable in Kentucky, but the deposit in that case was held taxable by reason of the fact that it was the *accumulation of income derived from business done in Kentucky, and of the further fact that it was subject to check by the local agent.*

In the case of *Commonwealth v. Northwestern Mutual Life Insurance Co.*, 32 Ky. Law Rep. 796, the Kentucky Court had held that notes and other choses in action representing loans made by the Northwestern Life Insurance Company and secured by mortgages on land in this State or by pledge of insurance policies, were not taxable in the State. The opinion was based upon the ground that the Kentucky law was not broad enough to cover such property. Although the property in this case was kept in Kentucky indefinitely for the purpose of

ultimate collection, the Kentucky Court held, quoting by the syllabus:

“Until the law changes the *situs* of such property by legislative enactment, it continues to be property not within this State, although it is in the hands of an agent in this State. In other words, *the mere presence of notes in this State does not alone give them a situs for the purposes of taxation.*”

Since the Kentucky Court had held that the mere presence of notes in this State did not give them a *situs* for the purpose of taxation, certainly it would not hold that the mere presence of money on deposit, unconnected with any other fact, would give it a *situs* for the purpose of taxation.

Nor did the Court mean in this *dictum* from the Hillman case that if the money was the accumulation or income from business done in Kentucky, or was sent to Kentucky for the purpose of being invested, either of these facts alone would give the money a taxable *situs* in the State. For in the Northwestern Insurance Company case, *supra*, the notes involved represented money which had been sent to this State for the purpose of being invested and in the very case, in which this language of the Hillman Land Company is quoted, to-wit, in the Prudential Insurance Company case, the facts were that the money represented accumulations solely from business done in Kentucky. Yet the Court, notwithstanding that *dictum*, held in the Prudential case that the money was not taxable.

Clearly, therefore, the language upon which opposing counsel lays so much stress is a *dictum* in the first place, and in the second place the Kentucky Court did not mean to say that any one of the conditions mentioned, considered separately, would give the money a taxable *situs*, but intended for them to be considered conjunctively.

For the purposes of this case, however, it does not make any difference what the Kentucky Court held in the Prudential Life Insurance Company case or the Hillman Land Company case. The opinion in the case at bar is the law of Kentucky so far as the property involved here is concerned, and the question is whether this law violates the Fourteenth Amendment of the Constitution of the United States.

In the leading case of

Buck v. Beach, 206 U. S. 392,

this Court held that the intangible property there involved could not be taxed by the State of Indiana where the notes were physically located, although the notes in question had been in Indiana for many years.

In this case one by the name of Nash, a resident of New York, had been loaning money in the State of Ohio through an agent there. The money loaned "was evidenced by Ohio notes, made by the borrowers, who were residents of Ohio, the payment of the money borrowed being secured by mortgages on lands

situated in Ohio. The moneys loaned were loaned through an agent of Mr. Nash, residing in Cincinnati. The notes were dated and payable in Cincinnati, to the order of Mr. Nash, but were not endorsed by him, and all renewals and payments on account of them were made to his agent in Cincinnati. All moneys paid upon or by reason of these notes were deposited in a bank in Cincinnati to the credit of Mr. Nash, and no part thereof was sent to Indiana."

James Buck was the agent of Mr. Nash at Lafayette, Ind., for many years. The notes were sent to him from Cincinnati by the agent there, during the years in question together with mortgages securing the payment of the notes, and were kept in a safe at Lafayette, Ind., by Mr. Buck. But no business was transacted in regard to these notes, nor any use made of them in Indiana, otherwise than that a short time before the interest on, or the principal of, the notes became due they were sent to the Ohio agent to have the interest payments made to him endorsed upon them, or to be delivered up if the principal were paid. Nothing else was done in Indiana in regard to the notes, except that a few days prior to the first day of April in each year (which is the day upon which assessments for taxes are made by law in the State of Indiana) Mr. Buck sent the notes and mortgages to the Ohio agent, and a few days subsequent to that day in each year the same were returned by the Ohio agent to Mr. Buck, who retained them in his possession.

In this proceeding the State of Indiana sought to tax these notes on the ground of their long continued presence in the State of Indiana. But this Court held on the one hand, that the notes were not thus given a *situs* for taxation in Indiana, and on the other, that they could be taxed in Ohio where they were under the complete control and management of the Cincinnati agent of the New York owner.

The facts, as stated in the opinion, do not bear out opposing counsel's statement in his brief that the notes were in Indiana only temporarily on the assessment day in Ohio, and that they were in Ohio at all other times.

This case supports both of our propositions, to-wit:

(a) That the mere length of time during which intangible personal property may be left in a jurisdiction does not give that jurisdiction power to levy a *property tax*.

(b) That intangible property, such as is involved in the case at bar, may be taxed in a jurisdiction other than the domicile of the owner, provided it either grows out of business done within the jurisdiction of that State and between the residents of that State, or is under the local control and management for business purposes of some agent in that State.

But it may be said that the reason the notes were held not taxable in Indiana in this case is because it appeared that they were sent there for the purpose of escaping taxation in Ohio. If this

opinion is to be given such a narrow construction, we would say in answer that in the case at bar both the Circuit Court and the Court of Appeals were of the opinion that Ewald left his money on deposit in St. Louis in order to escape taxation in Kentucky.

The Circuit Court says:

“In the case at bar there can be no doubt that the system employed was a device resorted to in order to escape the payment of taxes, and if the scheme was illegal, it will not be allowed to avail.” (Opinion of the Chancellor, Record, p. 178.)

Such also was the finding of the Court of Appeals of Kentucky:

“It (referring to the money on deposit) was placed on deposit to the credit of the Ewald Iron Company by L. P. Ewald in an effort to evade the tax laws of this State and to prevent it being subject to the taxes assessed L. P. Ewald.” (Finding of three judges, no contrary finding by other members of the court.) (Record, p. 266.)

In the case *involving taxes on a similar deposit* for the year 1910 (assessable September 1, 1909) the Kentucky Court of Appeals there describes the method employed in reference to the deposit of this money in St. Louis (*Ewald Iron Co. v. Commonwealth*, 140 Ky. 692):

“He (Ewald) was the sole stockholder; he had charge of the corporation. Having control of the corporation he did not wind it up, and

in disregard of the statutes, continued to do business in that name, *thus failing to give in the property for taxation as his property at his residence*. The reason it was done is not difficult to see. The money was deposited in St. Louis in the name of the Ewald Iron Company. It thus escaped taxation altogether." (Record, p. 168.)

It seems, therefore, that the case of *Buck v. Beach*, *supra*, sustains our contention in the case at bar.

Opposing counsel cites the case of

Wheeler v. Sohmer,
233 U. S. 434,

to sustain his contention that the mere presence of these surplus deposits in St. Louis was sufficient to make them taxable there, and also that the case of *Buck v. Beach*, *supra*, has been overruled. His argument is sound in neither respect.

In the first place, this case of *Wheeler v. Sohmer* involved an *inheritance* tax as distinguished from a *property* tax.

In the second place, all of the justices considered the principle of *Buck v. Beach* sound, and the three that dissented did so because they thought the effect of *Wheeler v. Sohmer* was to overrule *Buck v. Beach*.

The tax in this case was an *inheritance* tax on promissory notes left by a testator and non-resident of New York in a safety deposit box in New York, the notes being made by a resident of Chicago in that

city and secured by mortgages on Chicago land to Illinois trustees or by a Virginia corporation. There were three opinions in the case, one by Mr. Justice Holmes, and a concurring opinion by Mr. Justice McKenna, and a dissenting opinion by Mr. Justice Lamar. In order to understand this case and its effect, it is necessary, therefore, to analyze these opinions separately.

In the opinion by Mr. Justice Holmes, in which Justices Day, Lurton and Hughes seem to have joined, it was pointed out that the appraiser had held that these notes were taxable under a certain New York law imposing a tax "when the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." The Circuit Court affirmed the appraiser's report, and his order was affirmed by the Appellate Division and the Court of Appeals.

Mr. Justice Holmes points out that this Court was bound by the construction given to the New York Statutes by the New York courts. In other words, it was assumed that the safety deposit box, in which the notes were found, was their permanent resting place, and the question to be decided was whether a statute, *which must be read as purporting to give to bills and notes within the State the same standing as bonds for purposes of taxation*, goes beyond the constitutional power of the State. The opinion goes on to say that, unless the Court is bound by authority,

the statute, so far as this Court is concerned, is plainly within the power of the State to pass.

This opinion assumes that the States have "power to deal with negotiable paper on the footing of situs" or, rather, that such a power has been asserted or implied in several cases, citing the *Stempel*, *Bristol* and *Metropolitan* cases, *supra*, *et al.*

The opinion then says that *Buck v. Beach*, 206 U. S., is not in conflict with this position, and points out that in *Buck v. Beach* it was shown that the notes were sent to Indiana *with the intent to avoid taxation*; that they were really in Ohio for business purposes and that their absence from Ohio was regarded as a temporary absence from home; also that the conclusion reached in *Buck v. Beach* "is carefully limited to a refusal to hold the presence of the notes 'under the circumstances already stated' to amount to the presence of property within the State." The opinion also points out that a distinction was made in *Buck v. Beach* between a *succession* tax law, such as was involved in the *Wheeler* case, and a *property* tax, and that the only point decided by *Buck v. Beach* was that the notes had no such presence in Indiana as to warrant a *property* tax.

In the concurring opinion by Mr. Justice McKenna, in which Mr. Justice Pitney concurs, issue is taken with the proposition said to be the basis of Mr. Justice Holmes' opinion that "states have power to deal 'with negotiable paper on the footing of situs'; that is, to regard such paper so far concrete and

tangible as to be of itself a subject of taxation, irrespective of the domicile of the owner, * * * or the locality of the debt which it represents." Mr. Justice McKenna then discusses the *Stemple* and other cases, and points out that in those cases the notes or checks, as the case might be, were not taxed themselves, but that the tax was upon the rights of which they were the evidence; and that those cases are not authority for the broad proposition that negotiable paper has such tangibility as to be of itself a taxable entity.

The justice then distinguishes the *Wheeler* case from *Buck v. Beach* as follows:

"But we are not required to overrule *Buck v. Beach*, nor make it yield in any particular in order to sustain the tax in the case at bar. It, in effect, reserved from its principle *inheritance or succession taxing acts* by rejecting as not in point cases which involved them. We said: 'The foundation upon which such acts rest is different from that which exists where the assessment is levied upon *property*. *The succession or inheritance tax is not a tax upon property*, as has been frequently held by this Court (*Knowlton v. Moore*, 178 U. S. 41; *Blackstone v. Miller*, 188 U. S. 189), and therefore the decisions arising under such inheritance tax cases are not in point.'

"The tax under review is of that kind. In other words, it is not a tax *on property*, but a tax upon the *transfer* of the property by the will of the testator of plaintiffs in error, as provided by the laws of the State."

Mr. Justice McKenna then points out that the laws of New York were invoked to accomplish a transfer of the notes and subject them to the dispositions of the will of the testator and make effectual the purposes of the testator and FOR THIS REASON New York had a right to levy this inheritance tax.

In a dissenting opinion, concurred in by the Chief Justice and Mr. Justice Van Devanter, Mr. Justice Lamar uses this language:

“I concur in Mr. Justice McKenna’s analysis of *Buck v. Beach* and the other cases, but am of the opinion that the principle there decided applies as well to inheritance and transfer taxes on notes as to direct taxes; and that therefore the judgment in the present case should be reversed.”

In other words, *all six of the concurring justices were emphatic in declaring that there was no purpose to overrule Buck v. Beach*. Three justices dissented from the opinion because they considered that the rule of *Buck v. Beach* was modified by this decision, they, of course, being also in favor of following strictly *Buck v. Beach*. It is apparent, therefore, that the Court was unanimous in considering *Buck v. Beach* should still be the law.

Five out of nine justices were of the opinion that a State has not the power “to deal with negotiable paper upon the footing of situs,” or to regard such paper so far concrete and tangible as to be of itself a subject of a *property* tax.

In the case at bar we are dealing with a *property* tax, and not a tax on the SUCCESSION, and we have not even such tangible property as a negotiable instrument, but only bank deposits, the amount of which were evidenced only by the banks' books and the daily balance sheets sent to Ewald in Louisville, and it seems that these cases show clearly that the mere presence of such an account within the confines of a State, however long continued, unconnected with any other fact, is not sufficient to make it subject to a *property* tax.

It would seem unwise to hold that the mere presence of money on deposit in bank in a State other than the domicile of the owner, unconnected with any other fact, even though such deposit continued for a long time, would give such a State the right to tax such deposit to the exclusion of the domicile of the owner. Such a test for fixing the taxable *situs* of a bank deposit would involve much practical difficulty. Can it in fact be said that there is such a thing as a permanent bank deposit, when the owner has the right to draw the money out at any time he may choose and without notice to the bank, as in the case at bar? How long a time would be considered necessary to constitute a permanent deposit? Where must the line be drawn, for it must be drawn somewhere? If such a principle were laid down by this Court, it would also be practically impossible to tax such a deposit, because as soon as the principle was established no one would leave a deposit at any particular bank

for a sufficient length of time to allow the State to tax it. Whereas the tests we have suggested, and which seem to be established by the above cases, ~~is~~ ^{are} not only of simple and certain application, but seem entirely in accord with the dictates of common sense.

III.

**This Court Has Never Held that Intangible Property,
Such as is Involved Here, Could Not Be Taxed By
the State of the Domicile of the Owner, Even
Though Another State Might Have
Imposed a Tax.**

We hope we have convinced the Court that these St. Louis deposits had not acquired and could not acquire, a taxable *situs* there. Should the Court not agree with us, however, but be of the opinion that these deposits might have been taxed by Missouri had Missouri a statute covering the subject, we still insist that this tax by Kentucky should be upheld. It does not follow, as contended by opposing counsel, because one State *might* tax intangible property such as is here involved, on the theory that it had acquired a "business *situs*" there, that therefore the State of the domicile of the owner can not tax it in return for the protection afforded the owner.

It is significant that the cases cited by opposing counsel to uphold the contention that the property involved was subject to taxation in Missouri, are practically all the cases in which the power of a State to levy a tax was *upheld* by this Court. These

cases show distinctly how adverse this Court is to deny a State the right to levy a tax; they look at the proposition from the standpoint of Missouri. But Missouri is not attempting to tax this property on the ground that it had acquired a *situs* there. This Court will consider the matter from the standpoint of Kentucky, the domicile of the owner of the property. None of the cases cited by opposing counsel with reference to the "business situs," involved the right of the domicile of the owner to tax the property in return for the protection given the owner and on the basis of its jurisdiction over him.

In this connection we would call the Court's attention to the following well-settled principles:

In *McCulloch v. Maryland*, 4 Wheat. 428, this Court considered very carefully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said:

"That the power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the Government may choose to carry it."

Tracing the right of taxation to the source from which it was derived, it was further said:

"It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sov-

ereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation."

In *Bank v. Billings*, 4 Pet. 563, this Court said:

"This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interests, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."

In *State Tax on Foreign-held Bonds*, 15 Wall. 300, this court uses this language:

"Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

In the very recent case of *Wheeler v. Sohmer*, 233 U. S. 434, this Court uses this language:

"The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to." Citing *Louisville & Nashville Railway Co. v. Barbour Asphalt Paving Co.*, 197 U. S. 430.

In the case of

Kirtland v. Hotchkiss,
100 U. S. 491,

it was held that the State of Connecticut had not violated any provision of the Constitution of the United States by imposing a tax on certain notes belonging to a resident of Connecticut, although they were executed in Chicago, made payable in Chicago and secured by mortgages in Chicago. Under the authority of *New Orleans v. Stempel, supra*; *Metropolitan Life Ins. Co. v. New Orleans, supra*, and *Liverpool, etc., Ins. Co. v. Board of Assessors, supra*, these notes might have been subjected to taxation in the State of Illinois had that State laws broad enough to assess them, yet this fact did not deter this Court from holding that no provision of the Constitution of the United States was violated by Connecticut in levying a tax upon these notes.

After referring and quoting the language which we have quoted above from *McCulloch v. Maryland*; *Bank v. Billings*; *In re State on Foreign-held Bonds*, this Court in the Hotchkiss case uses this language:

“We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which under the Constitution of the United States exist between the Federal and State Governments. Upon their strict observance depends, in no small degree, the harmonious working of our complex system of

government, Federal and State. It may, therefore, be regarded as the established doctrine of this Court, that so long as the State, by its system of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured to the citizen by the Constitution of the United States, this Court, *as between the citizen and his State*, can afford no relief against State taxation, however unjust, oppressive or erroneous.

“Plainly, therefore, our only duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

“The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall. 320 (82 U. S., XXL, 187). *It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow citizens of the same State, to contribute for the support of the Government whose protection he enjoys.*”

After considering the nature of the intangible property taxed, the Court then concludes as follows in the Kirtland case:

“It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its

residents shall contribute, by way of taxation, to maintain its Government. Its discretion in that regard is beyond the power of the Federal Government in any of its departments to supervise or control for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exertion by Congress of the power to regulate commerce among the several States. *Nathan v. Louisiana*, 8 How. 73; *Cooley, Tax.*, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal Government can not rightly interfere."

We have quoted quite fully from this case because it sets out in the language of this Court the contention we are now making. This case has been referred to and quoted from with approval in *New Orleans v. Stempel*; *Metropolitan Insurance Co. v. New Orleans*, and *Liverpool, etc., Insurance Co. v.*

Board of Assessors, supra, and many other cases, and the law of the case has not been modified by any of them.

After discussing and quoting from this Hotchkiss case in *Liverpool, etc., Insurance Co. v. Board of Assessors, supra*, the Court uses this significant language:

“But, as we have seen, the jurisdiction of the State of his domicile, over the creditor’s person, does not exclude the power of another State in which he transacts his business, to lay a tax upon the credits *there accruing to him against resident debtors*, and thus to enforce contribution for the support of the Government under whose protection his affairs are conducted.”

We contend that the converse is also true. That the power of a State in which one transacts his business, to levy a tax upon his credits *there accruing to him against resident debtors*, and thus enforce contribution for the support of the Government under whose protection his affairs are conducted, does not exclude the jurisdiction of the State of his domicile to levy a tax upon such intangible property in return for the protection afforded him and as a part of his general property.

The case of

Union Refrigerator Transit Co. v. Kentucky,
199 U. S. 194,

is not in conflict with our contention here. In fact the correctness of our contention is implied, if not plainly admitted in the opinion in that case. After pointing out the distinction between tangible and intangible property; and how impracticable it is to try to tax the latter except by the State of its owner, the Court says:

“In this class of cases (*i. e.*, cases involving taxation of intangible property) the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner *as the real situs of the debt*, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this Court. *Tappan v. Merchants’ Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558; *Bonaparte v. Appeal Tax Court*, 104 U. S. 592, 26 L. Ed. 845; *Sturges v. Carter*, 114 U. S. 511, 29 L. Ed. 240, 5 Sup. Ct. Rep. 1014; *Kidd v. Alabama*, 188 U. S. 730, 47 L. Ed. 669, 23 Sup. Ct. Rep. 401; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277.

“If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the situs. * * *

“The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectable, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a State other than that of its owner, is taxable there.”

In this case it was admitted that the property sought to be taxed was permanently located in other States than Kentucky and employed there in the transaction of the business of the company. In other words, there was no question as to the *actual situs* of the property sought to be taxed. In the case at bar there is a very serious question as to the *actual situs* of the property involved. In fact it can not be said that the property involved has an *actual situs*. It may be said of these deposits, as was said of the credits on open account involved in the *Liverpool, etc., case v. Board of Assessors, supra*, “being incorporeal, they can have no actual situs.” We are brought, therefore, within the principle of, or at least within the reasoning of, the case of

Southern Pacific v. Kentucky,
222 U. S. 63.

In that case it will be remembered that this Court upheld a tax by the State of Kentucky on ships

belonging to the Southern Pacific Railroad Company, a Kentucky corporation, plying between New York and New Orleans and New Orleans and Havana, and also between New York and Galveston, on the theory that these ships, not having acquired a taxable situs elsewhere, were subject to taxation at the domicile of the owner. In distinguishing the facts of that case from the Union Refrigerator Transit Co. case the Court uses this language:

“It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular State, and quite another to attribute to a sea-going ship an actual situs at any particular port into which it goes for supplies or repairs, or for the purpose of taking on or discharging a cargo or passengers.”

And further on, referring to the question of the taxable situs of such a ship, the Court quotes with approval this language from *People, Ex Rel., Pacific Mail, etc., v. Tax & A. Comrs.*, 58 N. Y. 242-246:

“To determine their situs, for purposes of taxation by their longer or shorter stay in a particular port, or by their more or less frequent resort to it, would introduce perpetual uncertainty; it would, practically subject them to taxation in every port, or exempt them in all.”

Applying these principles to the case at bar, we might ask whether Kentucky's right to tax the deposits involved, is to be determined by entering into

a discussion as to whether most of the business which the owner carried on was carried on in Kentucky, or in Missouri, or in some other State, rather than by the simple rule that it is taxable at the domicile of the owner.

The following language of this Court in the *Southern Pacific* case is very apt in the case at bar:

“The difficulties attendant upon the taxation of *intangible* property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper *situs* for purposes of taxation.

“The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. *Protection and taxation are not necessarily correlative obligations*, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law.

“Take the case in hand. The Southern Pacific Company is a corporation having much extraordinary power. It only exists and exercises this power by virtue of the law of Kentucky. By the law of its being it resides in Kentucky, and there maintains its general office, and there holds its corporate meetings. *To say that the protection which the corporation receives from the State of its origin and domicile affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law.*

What is the protection accorded these vessels at any of the ports to which they temporarily go for purpose of business? What protection do they receive from the State or City of New York other than that accorded to every other ship which visits that port, foreign or domestic, for repairs, supplies, or other business?"

In the case at bar not only was Louisville entitled to this tax as the domicile of Ewald, but we also have the element of protection afforded by Louisville and Kentucky. Kentucky incorporated the Ewald Iron Company and it was by virtue of the laws of Kentucky that the corporation had a right to do any act. Louisville gave protection to the mill of the company where all of its iron was manufactured and it was out of this iron manufactured that the fortune involved was made. Not only so, but all of the affairs of the company were directed by Ewald from Louisville.

We have already discussed the case of *Adams Express Co. v. Ohio, State Auditor*, and pointed out the difference between the property taxed in that case and the property involved in the case at bar. It does not follow, because this Court held in that case that the twelve million dollars of intangible property of the Adams Express Company did not have a taxable *situs* at the home office of the company, but that each State could levy a franchise tax *in proportion to the business done in that State*, that therefore the State of Kentucky can not levy a tax in the case at bar upon the St. Louis deposits of the Ewald Iron Com-

pany. As we have said an entirely different class of intangible property was involved in the Adams Express Company case. The case simply upheld the right of the various States of the Union to levy a franchise tax upon public service corporations in proportion to the amount of business done in each State.

Our discussion, *supra*, of the case of *Louisville & Jeffersonville Ferry Co. v. Kentucky*, also shows that that case is not in conflict with the proposition for which we are now contending. As pointed out in that case there could be no doubt as to the *actual situs* of the Indiana franchise. It was necessarily and peculiarly within the State of Indiana and outside of the State of Kentucky. This being so Kentucky could not tax it. But in the case at bar it can not be said where was the *actual situs* of these bank deposits. "Being incorporeal they have no actual situs." There is no reason, therefore, why the principle of *mobilia sequuntur personam* can not be applied to them.

IT HAS BEEN HELD THAT TWO STATES MAY LEVY AN INHERITANCE TAX UPON THE SAME PROPERTY.

It has been held that two States dealing each with its own law of succession, both of which the plaintiff has to invoke for his rights, may tax the right which they respectively confer without giving cause for complaint on constitutional grounds. *Blackstone v. Miller*, 188 U. S. 189. To support this

principle of law the Court, in *Blackstone v. Miller* cites *Coe v. Errol*, 116 U. S. 517. Yet *Coe v. Errol* did not involve an *inheritance* or *succession* tax, but involved a *property* tax on tangible property, and in that case the Court uses this language:

“We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the Government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view.”

Certainly there does not seem to be any more reason why two States might levy *inheritance* or *succession* taxes on the same property in return for any rights thereto which they may confer, than that two States might levy a *property* tax on intangible property such as is involved here which can not be said to have acquired an *actual* situs in either State, one

tax based on the business done in the State by the owner of the property and the other tax based upon the jurisdiction of the State over the person of the owner, without violating any right granted under the Constitution of the United States. In fact the above authorities seem to establish this proposition.

See also Note 15 L. R. A. (N.S.) 142 + 150

**THE DECISION OF THE COURT OF APPEALS IN
THIS CASE DOES NOT DENY TO THE DE-
FENDANT THE EQUAL PROTECTION
OF THE LAW.**

Defendant insists that the present decision of the Court of Appeals of Kentucky is out of harmony with the earlier and later decisions of the Court on the same question, and that therefore he is denied the equal protection of the laws, his contention being apparently that the Court must adhere in all subsequent cases to a rule once laid down.

Our answer to this is, that the opinions of the Court of Appeals of Kentucky have been consistent in determining under what circumstances intangible property may be taxed by the State, and, in the second place, that even if it were true that the Court had departed at any time from the rule laid down in an earlier case, or cases, this raises no Federal question. We will discuss the latter proposition first as that seems to dispose of the matter.

I.

**The Fact that State Decisions May Be Inconsistent
Raises no Federal Question.**

Counsel argues in effect that the fact that a State decision may be inconsistent with an earlier decision, and that a decision subsequent to this second decision returns to the rule first laid down, thereby denies to the party in the second case the equal protection of the law. If this be true then a Court can not overrule a previous decision, or, if it should do so and find itself in error, go back to the earlier rule without denying to the intermediate litigant the equal protection of the law. Without for one moment admitting that the Kentucky decisions are inconsistent on the present question, as shown *infra*, we feel it sufficient to say in answer to this, that this Court has in the most emphatic language declared that no Federal question is raised by such inconsistent State decisions. In

Lombard v. Chicago Park Commissioners,
181 U. S. 33-44.

this Court held, in proceedings involving the validity of an ordinance proposing a tax where a similar objection was made, that it was not concerned whether the Supreme Court of Illinois had determined the question consistently with previous decisions of that Court, as such inconsistency, even if it existed, raised no Federal question.

The Court, by Mr. Justice White, says:

“And the principle thus inculcated not only disposes of the argument which we have previously considered, but also makes it clear that the Supreme Court of Illinois decided a local, and not a Federal, question when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment, which had been set aside, was made. The theory lying at the foundation of all the arguments advanced to show that the Court below committed error of a Federal nature is this, and nothing more, that the equal protection of the laws was denied by the Supreme Court of Illinois, because that Court, although it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that, because it is considered that there was inconsistency in the reasoning by which the Supreme Court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, as it can not be, every case decided in the Courts of last resort of the several States would be subject to the revisory power of this Court, wherever the losing party deemed that the reasoning by which the State Court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same Court in former cases. In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the Supreme Court of the State of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale

of our jurisdiction, we have not even approached its consideration."

II.

Kentucky Decisions Have Been Consistent Throughout in Upholding Taxes Following the Rule of Taxation of Intangible Property.

It ought to be a sufficient answer to plaintiff's contention in this connection to point out that the Court of Appeals has, in three distinct opinions, held that the property here involved, is taxable in Kentucky. The first opinion was rendered in 1910 and appears in *Ewald Iron Co. v. Commonwealth*, 140 Ky. 692, from which we quote the following, the Court referring to this St. Louis deposit by L. P. Ewald and Ewald's connection with the Ewald Iron Company:

"He was the sold stockholder; he had charge of the corporation. Having control of the corporation he did not wind it up, and in disregard to the statute, continued to do business in that name, thus failing to give in the property for taxation *as his property at his residence*. The reason it was done is not difficult to see. The money was deposited in St. Louis in the name of the Ewald Iron Company. It thus escaped taxation altogether. If taxed in Lyon County he would have to pay only a fraction of what he would have to pay in Jefferson County and so the money was kept in the name of the Ewald Iron Company, whose home was in Lyon County. *The money had no situs in St. Louis, it was simply deposited there. It was personal*

property which followed the person and was subject to taxation at the domicile of the owner.

* * * In matters of this sort the Court will not allow a device to defeat the purposes of the statute. The purpose of the statute is to place the burden of taxation equally upon all taxpayers; and if such a course as was here followed may be sustained to escape taxation at the residence of the real owner the purpose of the statute would be defeated."

Again, when the present case first came before the Court of Appeals the Court refused to change the rule which it had laid down in 140 Ky., as to the *situs* of said property being in Kentucky, and sent the case back to determine whether this property should be taxed in Lyon County, Kentucky, or in Louisville, thereby again, in effect, reaffirming its decision in 140 Ky. that the property had no taxing *situs* in St. Louis.

And finally, in the present opinion (Record, p. 266) the Court was unanimous in holding that this property had no *situs* for purposes of taxation in St. Louis. The Court evidently considered the matter so well settled in this State that it does not even discuss its former decisions.

In view, however, of the insistence of counsel that the Kentucky cases, with the exception of the present decision, are all against the power of the State to tax under the facts herein appearing, we will at some length go into the Kentucky opinions, although we respectfully submit that this Court is not concerned with what may have been decided in other cases by

the Kentucky Court of Appeals, as the decision in this case is of course the law of Kentucky for the purposes of this review. These cases, however, may also have some persuasive value, as we contend they are both clear and emphatic in sustaining what we believe to be the sound rule for the taxing of intangible property.

The Court will also notice, in considering these cases, that the Court of Appeals has shown no disposition to tax the property of a non-resident where the facts are not clearly within the rule which the Court has consistently laid down.

The rule in Kentucky as to the situs for taxation of money used in business in the State, is, that unless the money so used is under the control of a local agent or, if on deposit in banks, unless the local agent has the power to check upon the same, and use the same in the business in the State, such money is not subject to taxation in the State. The difference between the case at bar and the cases cited by opposing counsel is that in the case at bar as we have so often pointed out the Court found as a matter of fact that the money in bank in St. Louis did not arise out of business done in St. Louis or Missouri, and found further that it was not connected with the business of the Ewald Iron Company, nor did any agent in St. Louis or Missouri have power to check upon the same.

The general rule as to the situs of tangible and intangible property for taxation in Kentucky is

stated thus in *Commonwealth v. Haggin*, 30 Ky. L. R. 788:

"The situs of tangible personal property, for purposes of taxation is in the State in which it is permanently located and of stock, bonds, securities, credits and choses in action it is the domicile of the beneficial owner." (Citing several cases.)

The case of *Commonwealth v. R. G. Dunn & Company*, 126 Ky. 109, involved the taxation by the State of Kentucky of certain deposits in banks in Louisville and certain credits due the company.

The chief office of the company was located in the State of New York. Appellee had established an agency and office in Louisville, Ky., many years ago and had transacted a portion of its business there ever since. On September of the year involved it had on deposit in Louisville certain sums of money sought to be taxed. There was due to the Louisville office from subscribers (or persons transacting business with appellee) on each of the above assessing dates about \$5,000. The income from the Louisville office for each of the years named was \$40,000, which was deposited in the banks, *on which the manager drew checks for all current expenses and at the end of each month*, if there was any substantial balance on deposit, he would remit the New York office.

The Court decided upon these facts, that under the cases of *Bristol v. Washington County*, *supra*, and *New Orleans v. Stempel*, *supra*, Kentucky had the right to tax this money and these credits.

The next Kentucky case is that of *Higgins v. Commonwealth*, 126 Ky. 211. The question involved therein is thus put by the Court:

"Is intangible personal property, such as notes, mortgages, and bonds, held by and in the possession of a trustee in this State, *who manages and controls it*, liable for taxation for State, city and county purposes, at the residence of the trustee when the *cestui que trust* is a non-resident of the State? The property in question was not temporarily in the State. The trustee in whose custody it was, exercised complete control over it by loaning it out, investing the proceeds and collecting interest."

The Court held that the property was subject to taxation in Kentucky, and laid down this general rule:

"There is, of course, a marked distinction between what is known as *corporeal personal property*, such as live stock, lumber, or other material, and *intangible personal property*, like notes, bonds, and other securities. And it is generally recognized that *tangible* personal property has an actual *situs* at the place where it is located without respect to the domicile of the owner, whereas the *situs* of *intangible* personal property for purposes of taxation depends altogether on legislative enactment, or judicial construction. It does not always follow the beneficial owner; but may be taxed at the place *where the person resides who has the control and management of the securities, who lends out the money, collects the interest, and exercises other acts of ownership and control over it, and where it may be said to be permanently located, as much so as if the actual owner resided where it was.*"

We have already referred to the case of *Commonwealth v. Northwestern Mutual Life Insurance Company*, 32 Ky. L. R. 796. This case certainly shows that Kentucky can not be accused of grabbing property for the purpose of taxation unless it is fairly entitled to the tax.

In *Commonwealth v. Peebles*, 134 Ky. 121, it was held that a resident of Kentucky who qualified as the executor of a resident of Ohio was not subject to taxation as such executor on stock held by the decedent in certain Ohio corporations; it not even appearing that the shares of stock were never in the State of Kentucky. The Court said:

“It has also been ruled in many cases, both in and out of this State that when money, choses in action or other *intangible personal property* is in the actual custody of an agent or fiduciary within this State, who manages and controls it, by lending it out, investing it, collecting interest, and the like, that it is subject to taxation at the place where the agent or fiduciary resides, although the beneficial owners may be non-residents of the State.”

The Court then cites *Commonwealth v. Dunn*, *supra*; *Bristol v. Washington County*, *supra*; *New Orleans v. Stempel*, *supra*, and continues as follows:

“If the real and beneficial owner of property resides in this State, he is protected by our laws and has all the benefits and advantages enjoyed by our citizens, and so we demand that he must contribute his share towards defraying the expenses of the Government whose protection he

receives. *In exacting this contribution we do not stop to inquire where the evidences of the debts that he owns are located, or where his intangible property is situated. He is the owner of it; and, as it can not well have a situs for taxation in this State at any other place than his residence, at that place it must be assessed for taxation.* * * *

“Nor do we attach controlling importance to the fact that the paper evidences of the stock sought to be assessed was at all times actually in a safety vault or in the custody of some person out of this State. *The mere physical location of the stock is not the test of its liability for assessment.*.. The adoption of this rule would often defeat the collection of taxes that were justly due and put it in the power of fiduciaries and others to *escape taxation upon intangible personal property by simply removing it from the State* during the time that our laws require its assessment, *or, for that matter permanently,* as it could, although in another State, be as well managed and controlled by the executor as if it were in a vault in this State.”

In Commonwealth v. West India Oil Refining Co.,
138 Ky. 828, the facts were thus stated by the Court:

“The West India Oil Refining Company is a Kentucky corporation. Its principal place of business is in Jefferson County, but it has not transacted business of any kind in Jefferson County or in the State of Kentucky, or owned any property in the State, or had any officers or employes located in the State. All of its property has been, and is, located in Cuba and Porto Rico in the West Indies. It owns and has owned refineries in Cuba and Porto Rico. Its business is *all* done there. Its money was earned and

kept there, and its accounts were due and payable there."

The suit was brought to collect taxes on cash on hand, cash in bank and accounts, all of which were in the West Indies and due there. Upon these facts the Kentucky Court held that none of this intangible property was taxable in Kentucky.

Opposing counsel lays great stress upon this case as sustaining his contention. If in the *West India Oil Company* case, the oil refining had been done altogether in Kentucky; if all of its officers and managers had lived in Kentucky, and controlled the various operations of the company from and in Kentucky, and had only used the City of Havana as a point for its sales department, through which its oil was distributed, and had then left on deposit in Havana the money received from the sale of its oil refined in Kentucky, but surrendering to no one in Havana the right to check on this money, the Kentucky Court would not have hesitated one moment in holding that such property was taxable, not in the West Indies, but in Kentucky?

We believe we have fairly stated what would be a parallel case to the case at bar. How can it be said therefore that the *West India Oil Company* case decides, in effect, that the money here should be taxed in St. Louis, and not in Louisville?

The case of *Commonwealth v. Ky. Distilleries & Warehouse Co.*, 143 Ky. 314, is clearly distinguishable from the case at bar, as is shown by the

following quotation included in opposing counsel's brief from the opinion in that case:

"It is at this office that all the business relating to and concerning the distilleries operated by it is carried on, and there is kept all of the books, accounts and papers of the corporation that relate to the transaction of its business in this State. It may, therefore, be said that while the Kentucky Distilleries & Warehouse Company has a technical legal residence in the State of New Jersey, it has in this State a business residence at which all its business in this State is managed and carried on by resident agents and employes. It is here that the warehouse receipts are issued, and here that they are presented when the possession of the whiskey described in them is demanded, and here that the storage accounts are paid, although in the meantime and before they are actually transferred to the purchaser they may pass through an office of the company in New Jersey or New York. *It is here that the whiskey is located upon which these receipts are a lien*, and to which the company looks for the payment of its storage fees. In short, aside from *the fact that it has a mere technical legal residence in the State of New Jersey*, all of its business is conducted and carried on in this State, and for every business purpose it is a Kentucky corporation."

This additional fact should be added to the facts set out in this quotation, to-wit: All of the distilleries belonging to the Kentucky Distilleries & Warehouse Company having whiskey in storage were located in Kentucky, as was found by the Court

of Appeals, and the principal business office of the company was located in Louisville, Jefferson County, Kentucky. (See page 332 of the opinion.)

There is no analogy between that case and the case at bar. Here the Ewald Iron Company was not only a Kentucky corporation and Ewald a resident of Louisville, Ky., but all of the iron manufactured was manufactured in Louisville, and practically all of the iron that was sold was the iron manufactured. We will not lengthen this brief to recite again how the business of the company was absolutely controlled and directed to the minutest detail every day from Louisville by Ewald.

The further fact should be kept in mind that in the case at bar the iron from the sale of which these surplus deposits came, was sold all over the United States and there is no evidence of any of it being sold in Missouri; whereas, in the Distilleries & Warehouse Company case, the accounts sought to be taxed were due for storage on whiskey *located within the limits of the State of Kentucky*.

In *Hillman Land & Iron Co. v. Com.*, 148 Ky. 331, the land company, a Missouri corporation, with its home office and place of business in St. Louis, conducted large farming operations in Kentucky. All money which was received from the proceeds of the farm were forwarded to the company in St. Louis, which in turn would send money to Kentucky to be deposited in bank for the purpose of paying the cur-

rent expenses of the farm. A suit was brought to tax this money thus on deposit in Kentucky, relying on the Dunn case, *supra*, but the Court held that the money was not taxable in Kentucky.

It appeared that the expenses of the farm exceeded the income from these farming operations.

The Kentucky Court distinguished this case from the Dunn case in the following language:

“In the Dunn case, the decision that the deposit in bank was subject to taxation was put upon the ground that the deposit accrued from business carried on by Dunn & Co. *in this State* through an established agency in this State. *In this case the evidence shows that the money on deposit was not earned or accumulated in this State, but was sent here from another State for the purpose of being checked out to pay debts due by the non-resident.* It was not the profit or accumulations of any business done in this State. If this money on deposit was the proceeds of the farming or business operations of the appellant in this State, then this case would be controlled by the Dunn & Co. case.”

The case is also distinguishable from the case at bar, because in the case at bar the accumulated surplus deposits were in no way connected with the business of Ewald Iron Company or used in any business in St. Louis or Missouri. No one in St. Louis had power to check upon them but they were at all times under the absolute control of Ewald in Louisville. The business in which this immense surplus was accumulated was not confined to Missouri.

In the Hillman case the Court points out as a significant fact that there was no evidence of any scheme to evade the payment of taxes, and in this connection uses this language :

“If it was shown by fact or circumstance that the income here exceeded the expenses of the business, or that the practice of sending out of this State the money derived from business done in this State, and the returning to defray expenses of money to take the place of that sent out, was a device or scheme to evade the tax laws of the State, we would have no hesitation in holding the money subject to taxation. If a non-resident” (and a fortiori a resident like Ewald) “doing business in this State could evade taxation upon money in bank by merely adopting a course of business by which all the money collected here should at once be remitted to him, and in turn he would forward to this State the money to conduct the business, such scheme, if successful, would furnish an easy and simple method of escaping taxation on deposits. But it is scarcely necessary to add that such a scheme would not accomplish the purpose intended.”

In *Commonwealth v. Prudential Life Insurance Co.*, 149 Ky. 380, the property sought to be taxed was cash on hand, cash on deposit in bank, accounts and notes, secured and unsecured.

“The appellee is a non-resident corporation, with its chief office and place of business in Newark, New Jersey. It has, however, two branch offices in Louisville, which collect insurance premiums due the company, and deposit all such collections to the credit of the company in the Louisville National Banking Company, and

in the Southern National Bank, in Louisville.

* * * * *

"The Louisville managers of the business had no authority to check upon these accounts; on the contrary, the deposits were made daily, and promptly transferred to the home office in Newark, by drafts drawn by the home office upon the Louisville banks. The expenses of maintaining the Louisville offices were paid by money forwarded from the Newark office. The money on deposit in the Louisville banks was the proceeds of business done by the company in Kentucky; and the accounts and notes are due by policy-holders for premiums for insurance issued by the Louisville offices, and collectible by and payable at said offices. In other words, the cash on hand, and the accounts and choses in action, represent the revenue received by the appellee upon that portion of its business which was transacted wholly within the State of Kentucky."

It was attempted to bring this case within the principle of the Dunn case, *supra*, but the Court held that this property was not taxable, distinguishing it from the Dunn case, on the ground that in the Dunn case the money was checked upon by the local manager for the current expenses of the business and at the end of each month, if there was any substantial balance, it was remitted to the home office, whereas in this case the *Louisville managers had no authority to check upon the money collected by them from business done in the State*, but remitted daily to the home office everything collected. The expenses of the Louisville office were paid by money forwarded from Newark.

In other words, according to this Prudential case money on deposit, accounts and choses in action of a non-resident must not only arise out of or represent business done wholly in Kentucky, but must be under the control and subject to the check of the local agent.

It is the *dictum* of the Court in this case, which opposing counsel quotes with such confidence, to show that if money is on deposit in the State or arises out of business done in the State it is taxable here.

The last Kentucky case to which we call the Court's attention is *Commonwealth v. B. F. Avery & Sons*, 163 Ky. 828. Opposing counsel insists that this case is on all fours with the case at bar, and that it can not be reconciled with the decision of the Court herein. To reach this conclusion counsel wrongly assumes here as elsewhere that in the case at bar the money on deposit in St. Louis arose out of business done in St. Louis or Missouri in the first place, and in the second place that it was under the checking control of St. Louis agents, whereas, the Court of Appeals found that this money did not arise out of business done in St. Louis, that it was not in any way connected with business done in St. Louis nor was it under the checking control of any agent in St. Louis.

In the Avery case there is a stipulation in the record, which does not appear in the opinion, to the effect that B. F. Avery & Sons "had branch houses located at Atlanta, Memphis, New Orleans, Dallas, and Oklahoma City," and that the deposits of the

company at such cities (which were sought to be taxed by Kentucky) were "*realized solely from and used solely in business conducted at such branches respectively, and subject to check only by the particular branch located in the State or city where such deposits were kept.*" Thus the Avery case is brought squarely within the principle of the Dunn case.

It will be seen, therefore, that the Kentucky cases are in harmony with the decision in the case at bar.

**THE CITY IS ENTITLED TO RECOVER THE
AMOUNTS OF THE TAX BILLS HEREIN,
IRRESPECTIVE OF THE TAXING
SITUS OF THE MONEY IN
ST. LOUIS.**

The foregoing brief has been devoted chiefly to an answer to the contention of plaintiff in error that the money in bank in St. Louis is not taxable in Kentucky. As we have heretofore mentioned, however, this is not the only property belonging to Ewald which is covered by the assessments herein. In fact, not only have we affirmatively shown that Ewald possessed other property than these bank deposits, such as stocks in other corporations, etc., but under the provisions of the Kentucky statutes under which this proceeding is had, the City is entitled to recover the amounts shown by its tax bills without introducing any evidence to show that the taxpayer possessed any property whatsoever; the burden being upon *the taxpayer* to show in such a proceeding that he is *not*

possessed of property subject to taxation sufficient to support the bills. In other words, the burden shifts to the taxpayer after the City has completed its assessments in accordance with the statute. The assessment herein was for "omitted personal property" against the estate of L. P. Ewald for the years involved.

Section 2996, Kentucky Statutes (being part of the charter of the City of Louisville), provides:

"Each bill shall be authenticated by the assessor by his signature, or a stamped *facsimile* thereof, and when so authenticated, it shall be *prima facie* proof that all steps have been taken to make it a binding tax bill for the amounts and purposes, and against the person and property therein named or described."

The City complied with this statute in the case at bar and thereby made out its *prima facie* case.

In considering this section (2996) in *City of Louisville v. Courier-Journal Co.*, 140 Ky. 644, the Court of Appeals held that after the proof of the tax bill, as provided in the above section, "it was incumbent upon appellee (the taxpayer) to introduce testimony sufficient to overcome the *prima facie* case of appellant." It is not disputed by opposing counsel that this statute and the rule laid down in the *Courier-Journal* case are the law of the present case. He contends apparently that the City, having shown that Ewald was possessed of certain property (money in bank sufficient in amount to sustain the

assessment) if the plaintiff in error succeeds in showing that such property was not taxable in Kentucky, it is entitled to a judgment dismissing the appeal, in spite of the fact that it may be true, and is in fact here true, that Ewald possessed *other property* which was unquestionably taxable in Kentucky.

It is significant that the plaintiff in error nowhere states by any of its officials that the money in bank in St. Louis was all the property which L. P. Ewald possessed. Mr. Botts, the president of the trust company, merely states that he did not know of any other property belonging to Ewald on the dates involved. He does not say, however, that he made any effort to find out what other property Ewald possessed, or that he had no means of knowing of such other property. He does not say, and can not say, that Ewald had no other property on the said dates. As a matter of fact the City proved that on each of the assessing dates Ewald had a deposit in the Boatman's Bank, St. Louis, in his individual name and when he died owned stock in the Helmbacher Forge Co. worth \$110,000 and in the Granby Mining and Smelting Co. worth \$42,500; that he had had most of this stock on each of the assessing dates. Mr. Botts handled this stock (Botts, Record, p. 247, qq. 53, 54) and could easily have learned when it was issued, as he could have learned the amounts on deposit in the Boatman's Bank on each assessing date. In other words, Ewald had *at least* this property in

addition to the money in bank and opposing counsel has never seriously contended that this property was not taxable in Kentucky.

We respectfully insist, therefore, that on this question alone we are entitled to an affirmance of the judgment of the Court of Appeals.

This Court has expressly held that such a statute as 2996, shifting the burden to the taxpayer to show that he has not property sufficient to support the assessment, violates no constitutional guaranty. In *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323 (affirming *Bell's Trustee v. City of Lexington*, 120 Ky. 199) the Court had under review a construction of the corresponding section of the charter of the City of Lexington, Kentucky, and in which this Court said, referring to the lower Court:

“The Court has held that the burden rested upon the plaintiff (the taxpayer) to show the invalidity of the tax. Even if erroneous, the decision is not of a Federal nature. It had the chance, at all events, to show the invalidity of the tax in whole or in part. Upon the evidence given on the trial the tax was reduced, and the Court of Appeals has said:

“The claim of appellant to escape a retrospective assessment of the property of its *cestui que trust* in this case is wholly technical. That it owes the tax it seeks to evade is made apparent by an examination of this record. Although it had in its hands the means of instantly and most conclusively showing either that the trust estate did not own the property with which it was assessed, or that the values were too high, it intro-

duced no evidence whatever on this subject. While it was not incumbent upon the appellees to introduce any evidence, being authorized under the principles herein enunciated to await the evidence of appellant showing the invalidity of the assessment complained of, yet they did introduce evidence which we think clearly establishes that appellant justly owes the amount of the tax which has been adjudged against the estate of its *cestui que trust*.' (27 Ky. L. Rep. 595, 85 S. W. 1083.)"

The Court of Appeals, in the case which this Court has above quoted (120 Ky. 199), also uses the following language which is very appropriate to the conduct of the plaintiff in error in the present case:

"The rule, then, is, when one comes into equity asking for relief against taxation, it is incumbent upon him to show clearly that he has paid or is willing to pay all that he justly owes toward the public burden. He must make a *full, fair and complete disclosure of the property he has subject to taxation*, so that the Court may judge as to whether or not he is unjustly taxed. He must come, not only with clean, but with open hands."

In the case at bar plaintiff in error not only is resisting payment of the taxes, but asks that the City be perpetually enjoined from seeking further to collect any of the tax bills sued upon. (Amended answer and counterclaim, Record, pp. 107, 111.)

It was incumbent, therefore, on the plaintiff in error, to entitle it to a judgment, that it show affirmatively that it had no property subject to taxa-

tion which had been omitted from assessment on the dates mentioned. This it utterly failed to do, seeking to take refuge under evidence, which the City out of abundant caution and following the procedure in the Lexington case, had introduced in order to make the case all the stronger against the delinquent by showing that he did possess much property which had been omitted from taxation. Let us repeat that the City has never claimed in any stage of this action that the property shown by this evidence was all the property which the taxpayer possessed. In fact, that is a matter peculiarly within the knowledge of the taxpayer, and the law has very wisely put upon him the burden of showing what property he possessed, or of disproving the correctness of the assessment.

It may very well be presumed, therefore, both as a practical matter and under §2996 that Ewald possessed property of sufficient value independent of the money in St. Louis to support this assessment.

For the foregoing reasons we ask for an affirmation.

Respectfully submitted,

GEO. CARY TABB,

STUART CHEVALIER,

PENDLETON BECKLEY,

Counsel for Defendant in Error.

APPENDIX.

The statutes of Kentucky directly involved in this case:

“§2996. The assessor shall, during the month of December in each year, or as soon as the rates for the coming year are fixed, begin to make out the tax bills according to the provisions of the ordinances of the City levying taxes for the corresponding year, or according to the levy provided for in Section 2981, as the case may be, and shall list such bills for collection with the tax receiver by the third day of January following, or as soon thereafter as practicable; said tax bills shall be payable on the third day of January, and due on the first day of May in the year for which made out. The taxes on personal property may be included with those on some one parcel of land and improvements. Each bill shall be authenticated by the assessor by his signature, or a stamped *facsimile* thereof, and when so authenticated, it shall be *prima facie* proof that all steps have been taken to make it a binding tax bill for the amounts and purposes, and against the person and property therein named or described; and this rule of evidence shall apply to the tax bills of eighteen hundred and eighty-five and eighteen hundred and eighty-six that have been so authenticated under the ordinance of the general council.”

“§4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the same be in or out of the State, including intangible property, which shall be considered and

estimated in fixing the value of corporate franchises as herein provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale: *Provided, however,* That tangible personal property located and having a taxable situs without the State, of persons residing in this State, and of all corporations organized under the laws of this State, shall not be subject to taxation: *And, provided further,* That the situs of intangible personal property for purposes of taxation shall be at the residence of the real or beneficial owner, and not at the residence of the fiduciary or agent having the custody or possession of same. *Provided further,* That nothing herein contained shall in any way affect the liability for franchise taxes now payable by corporations organized under the laws of this State."

FIDELITY & COLUMBIA TRUST COMPANY,
EXECUTOR AND TRUSTEE OF EWALD, *v.* CITY
OF LOUISVILLE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

No. 424. Argued October 16, 17, 1917.—Decided November 5, 1917.

A person domiciled in Kentucky carried on a business in Missouri and deposited in bank in the latter State moneys derived from the business, but not used in it, and belonging absolutely to him. The resulting credits—ordinary bank accounts not represented by certificates and subject to his order only—were included by Kentucky authorities in assessing his taxes in that State. *Held*, that the tax, whether considered as a tax on property or as a tax on the individual measured by property, was within the power of the State imposing it. A state court's decision does not deprive the complaining party of the equal protection of the laws merely because it departs from decisions made by the court in earlier cases.

168 Kentucky, 71; 171 Kentucky, 509; 172 Kentucky, 451, affirmed.

THE case is stated in the opinion.

Mr. William W. Crawford for plaintiff in error:

Taxing property whether tangible or intangible not located within the taxing district violates the Fourteenth Amendment to the United States Constitution. *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385; *Union Transit Co. v. Kentucky*, 199 U. S. 194; *Foreign-held Bonds*, 15 Wall. 300.

Bank deposits growing out of business done in a State have a situs there and nowhere else. *Commonwealth v. R. G. Dun & Co.*, 126 Kentucky, 111; *Commonwealth v. Peebles*, 134 Kentucky, 121, 134; *Commonwealth v. West India Oil Refining Co.*, 138 Kentucky, 828; *Commonwealth v. Ky. Distilleries & Warehouse Co.*, 143 Kentucky,

314; *Hillman L. & L. Co. v. Commonwealth*, 148 Kentucky, 331; *Commonwealth v. B. F. Avery & Sons*, 163 Kentucky, 829.

Intangible property may acquire a business situs apart from the domicile of the owner and be taxable there and nowhere else. See cases cited above. *Adams Express Co. v. Ohio*, 166 U. S. 218, 223; *Lou. & Jeff. Ferry Co. v. Kentucky*, 188 U. S. 397; *Selliger v. Kentucky*, 213 U. S. 205; *New Orleans v. Stempel*, 175 U. S. 313; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395; *Wheeler v. New York*, 233 U. S. 434.

Judicial decisions come within the prohibition of the "equal protection" clause. *Yick Wo v. Hopkins*, 118 U. S. 356; *Ex parte Virginia*, 100 U. S. 339, 347; *Blake v. McClung*, 172 U. S. 239, 260.

The Kentucky Court of Appeals having, both before and after the decision of this case, held that § 4020, Kentucky Statutes, does not apply to bank deposits having a business situs outside of Kentucky, can not apply it to the bank deposits here. *Commonwealth v. West India Co.*, 138 Kentucky, 828; *Commonwealth v. Prudential Life Ins. Co.*, 149 Kentucky, 380, 385; *Commonwealth v. B. F. Avery & Sons*, 163 Kentucky, 828.

Mr. Pendleton Beckley and *Mr. George Cary Tabb*, with whom *Mr. Stuart Chevalier* was on the brief, for defendant in error:

Under the circumstances the principle of *mobilia sequuntur personam* applies, and the taxable situs of these deposits was Louisville, Kentucky. *Egan v. Hart*, 165 U. S. 188; *Board of Assessors v. New York Life Ins. Co.*, 216 U. S. 515; *Pacific Coast Savings Society v. San Francisco*, 133 California, 14; *Pyle v. Brennemann*, 122 Fed. Rep. 787; *Pendleton v. Commonwealth*, 110 Virginia, 229; *State v. Clement National Bank*, 84 Vermont, 167; *State v. Tennessee Coal, Iron & R. R. Co.*, 94 Tennessee, 295.

The amount and character of business done in St. Louis, as compared with the amount and character of business done in Louisville, were such as to make the "business situs" of these deposits in Louisville rather than in St. Louis.

Money on deposit must either arise out of business done within the State with the residents thereof or be under the control of a local agent, if it is to acquire a "business situs." *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395; *Liverpool, London & Globe Ins. Co. v. Board of Assessors*, 221 U. S. 346; *Walker v. Jack*, 88 Fed. Rep. 576; *Bluefield's Banana Co. v. New Orleans Board of Assessors*, 49 La. Ann. 43.

Cases involving taxes on franchises and on tangible property are distinguishable from the case at bar. *Adams Express Co. v. Ohio*, 166 U. S. 218; *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 397; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 202; *Delaware, L. & W. R. R. Co. v. Pennsylvania*, 198 U. S. 357.

As to the contention that the deposits were permanent deposits, it has never been held that the mere presence of a deposit in a State gives that State a right to levy a "property tax" upon it, no matter how long continued. *Buck v. Beach*, 206 U. S. 392; *Commonwealth v. Northwestern Mutual Life Ins. Co.*, 32 Kentucky, 796; *Wheeler v. Sohmer*, 233 U. S. 434.

This court has never held that intangible property, such as is involved here, could not be taxed by the State of the domicile of the owner, even though another State might have imposed a tax. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Southern Pacific v. Kentucky*, 222 U. S. 63; *Adams Express Co. v. Ohio*, 166 U. S. 218; *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 397.

Two States may levy an inheritance tax upon the same

property. *Blackstone v. Miller*, 188 U. S. 189; *Coe v. Errol*, 116 U. S. 517.

The fact that state decisions may be inconsistent raises no federal question. *Lombard v. Chicago Park Commissioners*, 181 U. S. 33.

Kentucky decisions have been consistent throughout in upholding taxes following the rule of intangible property.

The city is entitled to recover the amounts of the tax bills herein, irrespective of the taxing situs of the money in St. Louis. Section 2996, Kentucky Statutes; *City of Louisville v. Courier Journal Co.*, 140 Kentucky, 644; *Bell's Trustee v. City of Lexington*, 120 Kentucky, 199; *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the City of Louisville, Kentucky, to recover annual taxes for the years 1907 and 1908 in respect of personal property omitted from the original assessments to the owner L. P. Ewald in his lifetime. The facts as simplified for the purposes of argument here are that Ewald was domiciled in Louisville but continued to carry on a business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks subject to Ewald's order alone. They were not used in the business and belonged absolutely to him. The question is whether they could be taken into account in determining the amount of his Louisville tax. It would seem that some deposits were represented by certificates of deposit but it was stated at the argument that no point was made of that. See *Wheeler v. Sohmer*, 233 U. S. 434, 438. We are to take it that all the sums are to be dealt with as ordinary bank accounts. The decision of the state court upheld the tax. 168 Kentucky, 71. 171 Kentucky, 509. 172 Kentucky, 451.

So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that State, under the decisions of this court. *Liverpool & London & Globe Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354. *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395. But liability to taxation in one State does not necessarily exclude liability in another. *Kidd v. Alabama*, 188 U. S. 730, 732. *Hawley v. Malden*, 232 U. S. 1, 13. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value of such credits and chooses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. *Kirtland v. Hotchkiss*, 100 U. S. 491. See also *Tappan v. Merchants' National Bank*, 19 Wall. 490.

It is true that the decision in *Kirtland v. Hotchkiss*, concerned Illinois bonds, and that if they were physically present in the taxing State, Connecticut, a special principle might apply, as explained in *Wheeler v. Sohmer*, 233 U. S. 434, 438. See *Commissioner of Stamps v. Hope*, [1891], A. C. 476, 481; Dicey, *Confl. of Laws*, 2d ed., 312. But the decision was not made to turn upon such considerations; indeed its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this court has held the power of taxation not to extend to chattels perma-

nently situated outside the jurisdiction although the owner was within it; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far and there is opposed to it the long established practise of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax.

The notion that a man's personal property upon his death may be regarded as a *universitas* and taxed as such, even if qualified, still is recognized both here and in England. *Bullen v. Wisconsin*, 240 U. S. 625, 631. *Eidman v. Martinez*, 184 U. S. 578, 586. *Attorney-General v. Napier*, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland v. Hotchkiss*, *supra*, has been affirmed or assumed to be law in every subsequent case. *Bonaparte v. Appeal Tax Court*, 104 U. S. 592. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 29, 31. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421, 431. *New Orleans v. Stempel*, 175 U. S. 309, 321. *Liverpool & London & Globe Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 355, 356. It was admitted to apply to debts in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 205. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained.

It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Ken-

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tucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 44, 45. We presume that like other appellate courts the Kentucky Court of Appeals is free to depart from precedents if on further reflection it thinks them wrong.

Judgment affirmed.

The CHIEF JUSTICE dissents.
